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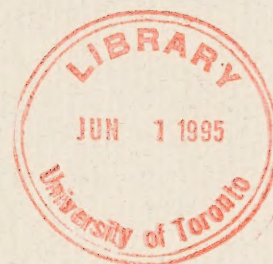
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Decisions
Volume 26, Part II
(1994)

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Summaries of Decisions
Volume 26 Parts I and II

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL
SUMMARIES OF DECISIONS* - VOLUME 26, PARTS I and II

CITED 1994 26 C.R.A.T. - Part I
1994 26 C.R.A.T. - Part II

- * This volume contains in some instances full decisions and reasons given, and in others, summaries only of Tribunal decisions and Supreme Court of Ontario decisions. If reference to the exact decision is desired, a request should be made to the Registrar.

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NICHOLAS STRUSS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
JACINTH HERBERT, Vice-Chair as Member
EDWARD WEISZ, Member

APPEARANCES:
NICHOLAS STRUSS, appearing on his own behalf

RICHARD CARTY, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 3 September 1993 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Nicholas Struss from a decision of the Ontario New Home Warranty Program disallowing his claims for repair of certain alleged deficiencies in his home built by Hilden Homes.

Struss assumed possession of the home on October 30, 1989 and although not produced in evidence, the Certificate of Completion is alleged to have been dated November 14, 1989. The warranty, therefore, under section 13(1)(a) of the Act would run from that date and the Applicant's claims fall within that time period. The date, however, is not material to this decision in that only one of Mr. Struss' complaints was delivered in writing to the Program within the statutory period of one year and we, therefore, find as a fact that all others advanced by him must be disallowed since they are barred by section 13(4) of the statute.

The only claim to be addressed by this Tribunal therefore is that which the appellant sets out in his correspondence of October 24, 1990 to the Program in which he says:

On contemplating selling our home, we had
a real estate agent appraise the above

and he brought to our attention that our roof needs replacing. It was pointed out to us that our roof has assumed the impression of a wet tent. In effect the roof in between trusses has sagged, i.e. the trusses protrude causing valleys and ridges.

It appears from this comment that the appellant had found his roof satisfactory until the real estate agent pointed out an aesthetic defect.

On November 7, 1990, Mr. Struss again complained to the Program.

The builder agrees that the roof appearance is very uneven and unsymmetrical. However he states that he used materials as specified in the Building Code and no matter what it looks like I will have to live with it.

We are aware that it may be several years before any damages result, however, this is not acceptable in my opinion and believe that this is what the New Home Warranty Program is all about - protecting buyers from shoddy materials and poor workmanship. These defects could not be seen when we purchased this home.

I am sure that considering the low pitch of the roof particle board of which 7/16ths width is at 24" centers was not what a majority of builders would use and still preserve their integrity. When an unfavourable observation is observed from the outside, it reflects on the workmanship of the whole house and devalues it considerably.

As a result a conciliation meeting was arranged attended by Mr. Terry Kidd on behalf of the Program, together with Mr. Struss and the builder Eric DenOuden.

The inspection report mailed to Struss on January 29, 1991 reflects the findings of the inspector.

1 **Complaint:** ROOF: APPEARANCE AND STRUCTURAL SUPPORT

Observation: The elongated elevated bungalow has a "hip" roof on the front and rear.

The homeowner is referring to a "dipping" at the hip ends. There was a slight dip in the mono truss, however, this may have been magnified due to the snow in the area. The homeowner was informed that a reinspection will be performed in the spring.

The homeowner also addressed the truss (premanufactured truss) layout with trusses being installed far beyond the 2'-0" o.c. manufacturer's specifications.

The homeowner is to contact the Warranty Program if any new developments occur, or in the spring when access is available.

Most unhappy with the conciliation report, Struss involved the building inspector for the City of Peterborough a Mr. Norman Mallory who wrote to him on March 21, 1991:

My observation of the roof does not indicate a collapse as you have suggested.

The slight dip in the roof is not a structural problem but would appear to be the results of the framing members being slightly higher or lower than the adjacent member. I note that someone has been in the attic area as the insulation has been moved and set aside for the hatch. In regards to the alignment of internal non-load bearing walls, this is not a structural problem and we consider it as being cosmetic.

Struss replied:

...the dip in question on the roof is a result of trusses that were placed at 48 inch centres which is more than twice the allowable amount of space. Also in this case chipboard was used and the spacing should have been 16 inch centres. How a person can mistake 48 for 16 fails me.

It does not appear the City of Peterborough was further involved in this matter.

In his evidence, Mr. Struss said the trusses under the cottage roof were not uniformly applied. Some of them are 20", some 25 1/2" apart giving the impression of the roof collapsing. He pointed out that the trusses were to be installed no more than 24" apart pursuant to the manufacturer's instructions and the Ontario Building Code. He said the appearance of roof troubles him and snow gathers more on it than on a normal roof.

Since the 24" space recommended by the manufacturer had been exceeded in some areas as alleged by Mr. Struss, the Program reinspected the home on August 15, 1991. The result was an acknowledgment of the variation in some of the spans between the trusses.

As per the list of deficiencies on the conciliation report and my inspection of January 3, 1991, item #1 of the "A(2)" (not covered under warranty) the roof of your home was in doubt.

During my recent (August 15, 1991) inspection of the attic, the premanufactured trusses in some places measured 22" o.c. and in other instances 25-1/2" o.c.

Upon consulting a local truss manufacturer, the 24" o.c. (max.) span for the trusses is an engineered measurement to be strictly followed.

It therefore follows that the builder is to consult a structural engineer for analysis and method of structural and visual repair.

This work is to be completed within thirty (30) days from receipt of this report.

The builder accordingly sought the advice of a structural engineer and after receiving his report directed it to the Program:

A structural engineer reviewed the truss design and has determined that the truss can withstand the design load even if trusses are spaced 25.5" on centres. Engineer design drawings are enclosed.

On November 25, 1991 the Program wrote to the appellant:

Enclosed is structural verification that the roof has been constructed, and within normal construction practices and guidelines. This verification does satisfy the Ontario New Home Warranty Program.

And on February 26 addressing the appellant's continuing concerns:

Item #1:

- a) When structural design does not exactly match the Part 9 tables of the Ontario Building Code, Structural design is referred to Part 4. I have confirmed with the Builder's Code Advisory of the Ministry of Housing that a professional engineer's stamp is satisfactory for structural analysis. We also accept the professional engineer's analysis (roof trusses). This is not warranted.

Mr. Struss despite the attempts at conciliation was adamant that his roof must be repaired or replaced and now comes to this Tribunal for redress.

The conciliator Mr. Terry Kidd giving evidence said that the roof structure was comprised of four common trusses with two girders at the end and some mono trusses in support. The complaint he said was on the front rear elevations where the mono trusses are. He found the roof satisfactory and quite acceptable with no deficiencies in material or workmanship. He considered, however, that the two 25.5" spacing required verification and the engineer's report accordingly was recommended. Even if there was an infraction of the Building Code in the spacing an engineer's report would override it. He pointed out that he had measured the trusses and found only one over 24". The mono trusses located in the front and rear of the house were 24" and this is where the sagging was alleged to be.

The next witness called by counsel for the Program was the City of Peterborough's building inspector, Mr. Norman Mallory. He was Chief Building Inspector for that City and had been in the department for some twenty-three years. Mr. Mallory pointed out that the certification by the engineer under part 4 of the Code suspended the mandatory part 9 and under part 4, no specified spacing was required. During his inspection of the roof, he found no defects in either workmanship or materials.

Eric DenOuden, the builder of the home who had inspected it three times, in his evidence said he noticed some sagging on the front roof, but none at the rear. This was simply the aspenite sagging slightly between trusses. He pointed out there was neither a defect in workmanship or materials, nor any other infraction of the Building Code. It appears his company which he founded in 1985 had built some 80 homes in the first four years of business without complaints.

There is an onus on the Applicant to prove the subject house was not constructed in accordance with the requirements of section 13(1)(a) of the Ontario New Home Warranties Plan Act. To succeed, he must bring evidence of a defect in either workmanship or materials or an infraction of the Ontario Building Code. Mr. Struss is the only witness appearing on his behalf. He has given his opinion and we accept the fact that there is a certain sag in one area of the roof. This, however, in itself does not constitute a defect in materials since none has been shown to us. It does not prove a deficiency in workmanship since we have no evidence before us of any defect in that area. It does not even substantiate an infraction of the Ontario Building Code (which is acknowledged) since the report of the engineer overrides it and discloses no deficiency which would fall within section 13(1)(a) of the Act.

We have the evidence of Mr. Kidd, supported by Mr. Mallory a disinterested party, and the builder DenOuden which we accept as truthful and honest. This evidence is overwhelming in its weight against the evidence of the appellant and this Tribunal therefore must find as a fact there is no defect in either workmanship or materials and accordingly no breach of warranty within the meaning of section 13(1)(a). It is admitted there is a slight sag in the front of the roof, but this we find is purely cosmetic and hardly evident. We have had the benefit of photographs tendered by Mr. Struss (Exhibit 7) which do not persuade us the aesthetic appearance of the home has been impaired.

On all the evidence therefore, the appellant's claim must be disallowed.

SUNFOREST INVESTMENT CORPORATION
PAUL WING

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE ONTARIO
NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding

APPEARANCES:

KEVIN D. SHERKIN, representing the Applicants
BRIAN CAMPBELL, representing the Ontario New
Home Warranty Program

DATE OF: 1 November 1994 Toronto
HEARING

REASONS FOR DECISION AND ORDER

This is an appeal by the Applicants from a decision of the Ontario New Home Warranty Plan Program dated May 4, 1994. The Applicants' claim for compensation pursuant to section 14(1)(a) of the Ontario New Home Warranties Plan Act was denied on the ground that the condominium units in question were purchased as investments for rental purposes. In the alternative, the Program argued that the transactions failed to close as a result of the Applicants' failure to qualify for the assumption of the first mortgage pursuant to paragraph 2(c) of each agreement of purchase and sale.

The Applicants did not deny that the condominium units were purchased as investments for rental purposes. As in Robert S. Templeton released by this Tribunal on November 4, 1994, the Tribunal finds that as the Applicants were not purchasing the condominium units for the purpose of residence, the provisions of the Act do not apply.

The Applicants applied for compensation under section 14(1)(a) which reads:

Where, a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

The definition of "vendor" under the Act is defined as "a person who sells on his, her or its own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner". An "owner" is defined as "a person who first acquires a home from its vendor for occupancy, and the person's successors in title". The Tribunal has interpreted the occupancy referred to as occupancy by the purchaser not occupancy by someone to whom the purchaser leases the unit. Otherwise, the phrase "for occupancy" would not form part of the definition.

As in Templeton, the Tribunal agrees that the case of Platinum I Property Ltd. Partnership et al v. Ontario New Home Warranty Program; Ontario New Home Warranty Program v. Marchant Building Corp; et al (1991) 1 O.R. (3d) 513 (Marchant) may have a somewhat different fact situation. The projects in Marchant were developed under agreements with limited partnerships and investors subscribed for an "interest" which was an undivided beneficial ownership interest in the limited partnership. It was ruled that this transaction was not an agreement to sell within the meaning of the Act. The subscription was to an interest in a limited partnership and not to a unit of real estate.

In this case, Sunforest paid no deposit monies and the beneficial owners signed no purchase agreements. All money was paid by the individual investors and only one investor, Paul Wing, signed a purchase agreement. Sunforest acted in trust for those investors for whom it signed all the documentation. Neither Sunforest or the investors had any intention of occupying the condominium units. In fact, Sunforest contracted with an agent to have the units rented. The business intent appears to have been to earn rental income and possibly sell the units in the future at a profit.

The Tribunal holds that, as in Marchant, "... there is an apparent lack of harmony between the nature of these transactions and the protection afforded by the Act". The purpose and intent of the Act, which is routinely referred to as consumer protection legislation, is not to protect investors from losses suffered as a result of bad investments. The Act is restricted to providing limited protection to purchasers of new homes, those who have purchased homes for their own use.

The Program denied the Applicants' claim in the alternative claiming that the transactions failed to close because the Applicants were unable to qualify for the assumption of the first mortgage pursuant to paragraph 2(c) of each agreement of purchase and sale. Counsel for the Applicants argued that it would be an abuse of process to hear evidence on this point as a judgment of the Honourable Justice Corbett was issued on November 29, 1993 in favour of the Applicants against Markan Group Inc. and Gotovac Holdings Inc. carrying on business as The Markan Group.

The Tribunal finds that the Program was not a party to the prior proceeding, the judgment was summary in nature with no one appearing for the defendants, and the issue in this case is whether the Applicants are able to meet the requirements of the Ontario New Home Warranties Plan Act for compensation. For these reasons, the Tribunal would not apply the principles of issue estoppel or res judicata. However, since the Tribunal finds that the Applicants' claims for compensation have failed on the first ground, it is not necessary to consider the second ground for denial of the claims.

Accordingly, by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal upholds the decision of the Ontario New Home Warranty Program to disallow the claim of the Applicants.

The above decision was appealed to the Ontario Court (General Division) Divisional Court. The appeal had not been concluded at the time of this publication.

ROBERT S. TEMPLETON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding

APPEARANCES:

ROBERT S. TEMPLETON, appearing on his own behalf

BRIAN CAMPBELL, representing the Ontario New
Home Warranty Program

DATE OF

HEARING: 26 October 1994

Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals a decision of the Ontario New Home Warranty Program (the "Program") contained in a letter dated December 4, 1992. The Applicant was denied refund of his deposit under section 14(1)(a) of the Ontario New Home Warranties Plan Act (the "Act"). The reason given by the Program was that the Agreement of Purchase and Sale in question states that the property was built and developed for the purpose of supplying rental accommodation to "third party" occupants. The Program concluded that this was an investment project which was not enrolled for protection of deposits or workmanship under the Act.

In general, the facts are not in dispute. The Applicant entered into an Agreement of Purchase and Sale with 702902 Ontario Inc. on December 10, 1987. He was to purchase unit #902 in Building #2 in Woodstock, Ontario. This was a condominium unit in a development called Cedar Downs.

The Applicant's involvement in the development resulted from his relationship with a personal financial planning group. In his testimony, he alleged that Laaran Management, the financial planning group, represented that the purchasers could occupy or rent the unit until they chose another use for it. He testified that he contemplated renting the unit and then using it as a retirement home for his parents or a residence for his children while attending college or university.

The developer arranged for a promissory note in the amount of \$16,000 through Guaranty Trust guaranteed by the Applicant and his wife. As well, the Applicant paid the first and second installments totalling \$10,000 on a second promissory note.

The entire amount invested by him was \$26,000. The two promissory notes were required by the Optional Services Agreement dated December 10, 1987.

Paragraphs 4(a) and 5 of the Agreement of Purchase and Sale state that \$931 would be held in a trust account until closing adjustments were completed. Paragraph 19 details these adjustments, which include (d), the enrollment fee for the Ontario New Home Warranty Plan. Paragraph 11(a) of the Agreement states that if registration has not occurred by June 30, 1991 or the turnover date has not been achieved by October 31, 1990, upon written notice by the purchaser, the vendor will refund all deposits. The Applicant has not been successful in recovering any of his investment funds from the vendor.

In early November 1991, the Applicant received a package confirming that the Cedar Downs project was not being built and that there was no money available to satisfy refund requests. The Applicant wrote to the Program on October 7, 1992 requesting a Proof of Claim form and applied on November 4, 1992 for the refund of his deposit on Cedar Downs. In his original application, the Applicant applied for the refund of \$931 since he believed that only the enrollment fee was refundable.

The Applicant received a decision letter dated December 4, 1992 from the Program disallowing his claim. An amended application for \$26,000 was faxed to the Program on March 15, 1993. The Applicant testified concerning various aspects of settlement negotiations with the Program which are not of concern to the Tribunal.

Schedule "A"1 to the Agreement of Purchase and Sale lists the Soft Costs associated with this investment and totals them at \$29,469. The Optional Services Contract attached to the Agreement outlines the services contracted for by the Applicant. These services are outlined in section 3.01 and include: mortgage arrangement fees, bank financing fees, leasing services, etc.

Paragraph 33 of the Agreement states that the units are being sold to purchasers for investment purposes and it is not the parties' intention that the units be occupied by the purchaser but rather, the units will be leased to third parties. The purchaser acknowledges that neither he nor any members of his family shall occupy the units at any time. As well, the parties acknowledge that the provisions of the Warranty Plan may not apply to the units or the common elements of the condominium.

Article 4.01 of the Optional Services Agreement is an acknowledgement by the purchaser that he will seek independent

professional advice on the income tax consequences of this investment. It appears to have been anticipated that tax benefits would accrue from this transaction.

Based on the Applicant's testimony, his own correspondence where he refers to himself as an "investor", and the letter dated March 7, 1988 from 702902 Ontario Inc. welcoming the Applicant as an investor in the Cedar Downs project, the Tribunal has little difficulty finding that the Applicant's involvement in the Cedar Downs project was as an investor. In his testimony, the Applicant admitted on cross-examination that he had deducted \$10,000 of his investment as a loss for income tax purposes. Although the Applicant now claims that he intended to use the unit for family purposes after renting out initially, that is irrelevant.

The Tribunal finds that as the Applicant was not purchasing the condominium unit for the purposes of residence, the provisions of the Act do not apply. The definition of "vendor" under the Act speaks to the sale of a home not previously occupied. "Owner" is defined as a person who first acquires a home from its vendor for occupancy. The occupancy referred to is occupancy by the purchaser not occupancy by someone to whom the purchaser leases the unit.

The purpose and intent of the Act, which is often referred to as consumer protection legislation, is not to protect investors from losses suffered as a result of bad investments. The Act offers limited protection to purchasers of new homes, purchasers who have purchased those homes for their own use.

The Tribunal agrees that the case of Platinum I Property Ltd. Partnership et al v. Ontario New Home Warranty Program; Ontario New Home Warranty Program v. Marchant Building Corp., et al., (1991) 1 O.R. (3d) 513 (Marchant) may have a somewhat different fact situation. The projects in question were developed under agreements with limited partnerships and investors subscribed for an "interest" which was an undivided beneficial ownership interest in the limited partnership. It was ruled that this transaction was not an agreement to sell within the meaning of the Act. The subscription was to an interest in a limited partnership and not to a unit of real estate.

However, as explained in Marchant, the Act has no application to a home that has been rented and it would have no application to buildings which are to be rented. In the same way as the essence of the subscription agreement in Marchant was to enjoy the benefit of tax deferrals and join with others in the business of renting housing units, the essence of the Optional Services Agreement in this case is to secure certain income tax

advantages and arrange for the leasing of condominium units by others. As expressed in Marchant, "...there is an apparent lack of harmony between the nature of these transactions and the protection afforded by the Act".

This claim fails on another ground as well. The definition of the term "deposits" in Regulation 892 is all money received on account of a purchase price payable under a purchase agreement. However, the \$26,000 paid by the Applicant in this case was paid for certain services specified in the Optional Services Contract. One of the services to be so provided was the arrangement of mortgages totalling the purchase price of the unit. Therefore, the money was not paid as a deposit on a home but for the provision of services.

Accordingly, by virtue of the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal upholds the decision of the Ontario New Home Warranty Program to disallow the claim of the Applicant.

TIMLIN, MARIE AND THOMAS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE ONTARIO
NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding
SUSAN TANNER, Vice-Chair, sitting as member

APPEARANCES:
MARIE AND THOMAS TIMLIN, on their own behalf

RICHARD CARTY, counsel, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 15 November 1993 Toronto

REASONS FOR DECISION AND ORDER

Marie and Thomas Timlin appeal a decision by the Ontario New Home Warranty Program to deny them compensation for their claim resulting from a delayed closing. Their claim totals \$920.00.

The Program, in two letters dated February 17, 1993 and April 13, 1993, denied the claim on the basis that "there had been no additional living expense incurred because of the delay". In addition, the Program took the position that the Timlins had provided insufficient verification of their claim for incidental expenses of \$500.00.

What is not disputed between the parties is that closing was delayed. The Timlins, as purchasers of a home under an Agreement of Purchase and Sale, were scheduled to close on August 27, 1992. They did not take occupancy until September 16, 1992. Their closing was therefore delayed by a total of 20 days.

The Timlins filed a Proof of Claim form with the Program, dated October 14, 1992. They claimed the following additional living expenses incurred as a result of the delayed closing:

a) Accommodation expense: \$20.00 per day X 21 days = \$420.00

b) Incidental expenses: \$25.00 per day X 20 days = \$500.00

TOTAL	\$920.00
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The Program disputes the entitlement of the Timlins to compensation under section 17 of Regulation 892 under the Ontario New Home Warranties Plan Act (the "Act"). Furthermore, if the Timlins are found to be entitled to compensation, the Program disputes the quantum claimed.

Turning to section 17, it is noted firstly that this section is found under Part VI of Regulation 892, which is titled "Warranties". The subheading for section 17 is "Delayed Closing". Thus, the Timlins' claim is based on a breach of warranty respecting closing.

We accept the argument by counsel for the Program that the Timlins' claim therefore falls under section 14(1)(b) of the Act. Section 14(1)(b) entitles an owner to compensation for damages where that "owner has a cause of action against a vendor for damages resulting from a breach of warranty".

The relevant portion of section 17(1) of Regulation 892 mandates that "the vendor shall compensate the owner for all direct costs caused by a delay in an amount that does not exceed \$100 a day for living expenses and \$5,000 in total".

Thus, the Timlins must meet the following legislative requirements in order to be entitled to compensation:

- 1) they must have a cause of action against the vendor for damages resulting from a breach of the warranty respecting closing; and
- 2) they must be able to present sufficient evidence that they have directly incurred costs caused by the delayed closing.

Dealing firstly with the evidentiary burden upon the Applicants, this Tribunal finds that burden has been discharged. The testimony of Marie Timlin was credible, in the view of this Tribunal.

Respecting the accommodation expense claimed, Ms. Timlin testified that rent was paid of \$20.00 per day from August 27, 1992 until September 16, 1992. A receipt for the sum of \$420.00 was accepted into evidence.

Respecting the incidental expenses claimed, no documentary evidence was presented. We note that the Proof of Claim form completed by the Timlins states that "receipts are required except for incidental expenses of up to \$25.00 per day".

We agree that receipts are useful corroborative evidence of expenses. Such documentary evidence would have assisted the Applicants in the substantiation of their claim. For example, Ms. Timlin claimed lost wages for one full day as part of her incidental expenses but did not present any records documenting this claim.

However, we do not find that the Applicants' claim for incidental expenses is defeated because of the lack of receipts. In support, we note the position of the Tribunal in the Etwaroo case, heard April 26, 1991, at page 637:

While it is true the application form does not require receipts for incidental expenses of up to \$25 per day, nevertheless, there must be some reasonable identification of what these incidental expenses consisted of and that they, in fact, had reference to expenses over and above what would be normal expenditures.

What is required of the Applicants is reasonable identification of the incidental expenses. This Ms. Timlin has done in her testimony. She stated that these additional expenses of \$25.00 per day were incurred in relation to food, gas, dry cleaning, postage and lost wages. These costs appear reasonable to the Tribunal and were sufficiently identified by Ms. Timlin to be allowable.

However, in order to be entitled to compensation, the Applicants are also required to have a cause of action against the vendor for damages resulting from a breach of the warranty respecting closing.

In a review of the evidence respecting the delayed closing, the Tribunal notes a letter from the Timlins to the vendor, dated August 21, 1992, less than a week before the scheduled closing of August 27, 1992. In this letter, the Timlins attempt to repudiate the Agreement of Purchase and Sale on the basis of an alleged major substitution by the vendor. The letter makes clear that the Timlins are demanding the return of their deposit and do not intend to proceed to close the transaction.

Mary Campeau, a representative of the vendor, testified that upon receipt of the Timlins' attempted repudiation of the contract, construction of the home ceased. By letter dated August 24, 1992, the solicitors for the vendor took the position that the Timlins' letter of August 21, 1992, constituted an anticipatory

breach of the contract. The Timlins were put on notice that they would be subject to an action for specific performance or damages.

The vendor's representative admitted in cross-examination that discussions with Mr. Timlin on August 24, 1992 made clear to her that the Timlins were no longer attempting to repudiate the contract. This is corroborated by a letter from Ms. Timlin to the Program dated December 11, 1992, in which she stated that Thomas Timlin "agreed verbally [with Mary Campeau, the vendor's representative] to postpone the closing until September 3, 1992".

By letter dated September 2, 1992, the solicitor for the Applicants wrote to the solicitors for the vendor, stating: "We presume that this [pre-occupancy inspection and release of funds] will take at least until Tuesday, September 8, 1992, and we propose to extend closing until that date with all other terms and conditions of the agreement of purchase and sale to remain unchanged and time to continue of the essence".

The transaction finally closed on September 16, 1992. Mary Campeau for the vendor testified that this closing date was one to which the parties mutually agreed. Ms. Timlin, in her letter of December 11, 1992 to the Program, claimed that the delays from September 3, 1992 onward were at the request of the vendor. There was some dispute in testimony respecting what impact, if any, the Applicants had upon the delay in closing through their scheduling of work by their hardwood flooring contractor.

In summation, the evidence presented at this hearing persuades this Tribunal that the Applicants both contributed and consented to a portion of the delay in closing. They contributed to the delay through attempting to repudiate the contract, thus affecting the Vendor's progress in performing the contract. The Applicants consented to a delay in closing: this is made clear in their proposal in writing through their own solicitor to extend closing until at least September 8, 1992.

Specifically, we find that the Applicants contributed or consented to a delay in closing from August 27, 1992, until and including September 8, 1992.

The result is that for this 12-day period the Applicants cannot be regarded as having a cause of action against the vendor for damages resulting from a breach of the warranty respecting closing. Because the requirement under section 14(1)(b) of the Act has not been met, the Applicants are thus not entitled to claim compensation for any costs incurred during this 12-day period.

We note that this finding is consistent with the position taken by the Tribunal in the Bradburn decision, released May 3,

1993. There the Tribunal held that the Applicant was not entitled to compensation for a delay in closing. Relevant to the Tribunal was the fact that the Applicant had "become one of the causes of the delay [in closing]". The Tribunal stated at page 7:

Even if the Tribunal found that the actions by the Applicant [causing the delay in closing] did not deprive her of her claim, the Tribunal still holds that the Applicant is not entitled to invoke section 19 [now section 17] of the Regulations....

By the agreement to extend the delays subject to all the original terms and conditions of the contract, the parties clearly intended to substitute one closing date for another. As a consequence, neither party could be in breach of the contract as a result of those delays having taken place.

However, for the period from September 8, 1992, up to and including September 16, 1992, being 8 days in total, this Tribunal finds that the evidence is not clear which party was responsible for the further delay in closing. We are not prepared to find that the Applicants would have had no cause of action against the vendor, for this 8-day period, for damages resulting from a breach of the warranty respecting closing.

Therefore, upon all the evidence, this Tribunal finds that the Applicants are entitled to compensation for costs, as claimed, for the delay in closing from September 8, 1992, up to and including September 16, 1992. These costs are calculated as follows:

a) Accommodation expense: \$20.00 per day X 8 days = \$160.00

b) Incidental expenses: \$25.00 per day X 8 days = \$200.00

TOTAL	\$360.00

Therefore, by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar of the Ontario New Home Warranty Program to allow the Applicants' claim, in part as indicated above.

ROBERT TURNER

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding

APPEARANCES:

ROBERT TURNER, appearing on his own behalf

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 13 July 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program rendered November 30, 1993 to disallow Mr. Turner's claim for the refund of his deposit of \$10,000. The claim was based on the failure by the builder to deliver the home on the date of closing in contravention of section 10(a) of the contract of purchase. The Program held that the deposit should be forfeited since the failure of the builder to meet the closing date was due to reasons beyond the builder's reasonable control. Under section 10(a) of the contract, reasons outside the control of the vendor permit the closing to be delayed for a corresponding period.

The hearing before this Tribunal took place over two days. At the conclusion of the first day of hearing, counsel for the Program asked that the hearing be extended to a second day to allow him to present a witness from the builder whose testimony the Program felt was essential. The Tribunal allowed the Program's motion.

At the conclusion of the hearing, the Tribunal rendered an oral decision. The present constitutes the written judgment of this Tribunal and is, therefore, in greater detail.

The first witness to testify was the Applicant, Mr. Robert Turner. He stated that he made deposits totalling \$10,000 to the builder, Law Development Group (Georgetown) Limited, against the purchase price of a condominium to be built. Closing date was March 1, 1992.

The Agreement of Purchase and Sale was drafted by the builder and contained, at page A-5, section 10(a) which reads as follows:

10.(a) The Vendor shall be permitted reasonable extensions of time to substantially complete construction of the Property if the Vendor shall be delayed for reasons beyond its reasonable control, including delays caused by strikes, fire, civil insurrection, floods or Acts of God and other events of force majeure and the Closing Date shall be extended accordingly. If the Vendor shall be unable to substantially complete the Property for occupancy for reasons that are within its control, it may extend the date for occupancy once for a period of up to 120 days upon at least 65 days' prior notice to the Purchase. The Vendor may be permitted a further extension of the date for occupancy for a period of up to 15 days upon 35 days' notice to the Purchaser. If the Vendor shall be unable to substantially complete the Property for occupancy within such reasonable extension of time, the deposit shall be return to the Purchaser with interest as prescribed by the Act, and without deduction and this Agreement shall be at an end, and the Vendor shall not be liable to the Purchaser for any damages whatsoever.

The above clause follows the provisions set out by the Ontario New Home Warranties Plan Act and constitutes the agreement between the parties as to what will occur if for some reason the closing date is delayed.

Mr. Turner testified that on December 17, 1991, the builder sent a letter, Exhibit 8, whereby, availing itself of section 10(a) of the contract, the builder extended the date of closing to June 26, 1992, the maximum extension allowed under section 10(a). The notice of extension was given with 65 days prior notice, as required by section 10(a). The delay was caused because of a third party appeal to the Ontario Municipal Board which prevented the builder from acting upon the Building Permit and delayed construction until the judgment by the Board.

On May 5, 1992, more than 35 days before the date of the first extension for closing, the vendor sent a notice to Mr. Turner informing him that closing date would occur at an earlier date;

viz., June 11, 1992. Mr. Turner was instructed to be prepared to execute the contract on that earlier date.

Six days before the new date of closing, on June 5, 1992, the vendor sent a new notice to Mr. Turner changing the date of closing from June 11 to June 29, 1992 due to what was termed "a delay in services". This notice was received by Mr. Turner only one day before the scheduled closing of June 11. It is to be noted that the effect of the June 5, 1992 letter was to give the vendor a further extension of the date of closing of three days from the original first extension of June 26, 1992. Under section 10(a) of the contract, the builder is permitted a second extension for date of occupancy of up to 15 days provided 35 days notice is given to the purchaser. In fact, the vendor failed to give 35 days prior notice to the purchaser of the second extension for closing.

Mr. Turner testified that because the vendor breached section 10(a) of the contract by failing to give proper notice of the second extension for closing, he was entitled to the reimbursement of his deposit since the vendor failed to meet the legal closing date of June 26, 1992. Under the terms of section 10(a) of the contract, Mr. Turner claims that he was entitled to automatically have the contract of purchase terminated and the deposit returned with interest. He stated that the last date that the vendor could send the notice of second extension was May 22, 1992, whereas the notice was sent June 5.

Mr. Turner went on to state that he asked the builder to reimburse his deposit. To this the builder replied that it was not prepared to return the deposit since the delays in closing were for events outside its control. The builder blamed the delays on delay in services from Halton Hydro in approving and powering up units. When Mr. Turner phoned Halton Hydro to check this, Halton Hydro denied that they had caused the delay.

When the builder refused to reimburse the deposit, Mr. Turner made the present claim to the Program.

In cross-examination, Mr. Turner testified that he was not prepared to accept compensation from the builder in order to proceed with the closing, but insisted on receiving his deposit back.

Mr. Andrew Webster, a real estate lawyer for the builder, appeared as the first defence witness.

He testified that March 1, 1992 was chosen as the first tentative closing date subject to obtaining minor zoning by-law variances from the Committee of Adjustment within the delay anticipated. Unfortunately, although the Committee of Adjustment

did in fact grant the variance, its decision was appealed to the Ontario Municipal Board by an adjoining land owner who was in no way related to the builder.

The Ontario Municipal Board rejected the appeal at its hearing on July 18, 1991. The delay, however, caused by the appeal process was lengthy and also forced the builder to do his construction during winter which added an additional six to eight weeks to the building schedule. Mr. Webster was of the opinion that the winter building conditions constituted an event beyond the control of the builder and caused the second delay. That is what resulted in the notice that the closing would be extended to June 29, 1992 from June 11.

The Tribunal notes that at the time of the second notice of May 5, contracting the delay to June 11, 1992, it was Spring; the builder was, therefore, no longer subject to winter conditions. Thus, the vendor at the time of the May 5, 1992 letter, had been able to factor in all the delays necessitated by the appeals to the Ontario Municipal Board and having to carry on the construction during winter conditions. For this reason, to avail himself of the defence of events outside his control, the builder would have to establish events occurring after May 5, 1992 that in themselves caused the delay and were major in nature and magnitude.

When Mr. Webster was asked what delays occurred after the May 5 letter which would fall within this category, he testified that he did not know. It was for this reason that counsel for the Program asked that a second day of hearing take place in order to present a witness for the builder who could answer this question.

That witness was Mr. David Lewis, who was the vendor's General Supervisor of Construction. He testified that he was responsible for the construction of the condominium project and the scheduling of the construction. He testified at great length on the delays which occurred before May 5, 1992, but that testimony is not relevant inasmuch as the vendor knew of all these events at the time the letter of May 5 was written. The first notice of extension of December 17, 1991, fixed the new date of closing for June 26, 1992 based on the builder's realization that the appeal to the Ontario Municipal Board and the winter building conditions would result in an inability to deliver on the date of closing first chosen.

When asked about the May 5, 1992 notice letter which shortened the date for closing from June 26 to June 11, 1992, Mr. Lewis said that he consulted with the builder before choosing that closing date. The witness went on to state that on June 6, 1992, a second extension notice was sent to have the date of closing moved from June 11 to June 29. He testified that this delay was

caused by a delay in services; more particularly, inspections by the municipality and by Ontario Hydro fell behind because numerous units had to be inspected over a very short period of time. All the closings for the project, numbering some 160 units, were to take place in a period of some two weeks. He stated that because inspectors were available in some cases only two days of a week, not all of the units could be inspected within the delays fixed for closing date.

In cross-examination, Mr. Lewis was asked to produce the construction schedule from May 5, 1992 on, as well as all scheduling documents. He stated that he did not have any such documents with him. He thus relied only on his memory. In this regard, it should be noted that certain of the delays cited by Mr. Lewis such as plumbing and electrical inspections were contradicted by documents in evidence which showed that these inspections were carried out prior to the May 5 letter. In similar fashion, while Mr. Lewis testified that the inspection of the insulation caused the delay, the evidence shows that the inspection was carried out May 8, 1992.

Under the circumstances, the Tribunal found that Mr. Lewis was not a credible witness; he came with no documentation and could give no detailed specifics which demonstrated that some event outside the control of the builder and of major magnitude had occurred after the May 5 letter was sent.

Mr. Lewis also testified that at the time of the May 5, 1992 notice letter, he himself would have preferred fixing a later closing date rather than the earlier one. He felt the builder was allowing itself too little time given the number of closings and the numerous inspections needed before all these closing could be done. He said that the closing date of June 11, 1992 was chosen rather than an extended closing date because the builder was locked into the original closing date of June 26, 1992. For Mr. Lewis, that was the latest date that the builder could close on. He was not aware that under section 10(a), the vendor is entitled to a second extension of 15 days upon giving proper notice.

From the testimony of Mr. Lewis, it became clear that as early as May 5, 1992, the builder realized that the closing date chosen was going to be very tight and that the preference of Mr. Lewis at that time was for a closing date that would take place after June 26, 1992. In this regard, the Tribunal notes that as at the May 5 date, the builder had more than ample time to give a 35 day notice for a second extension to a date of closing of as late as July 10, 1992. This was a closing date which the builder would have been able to meet since it is in proof that as at June 29, 1992, the builder was ready to close.

Mr. Lewis also testified that by virtue of his experience in construction, he was aware that a building project required inspections and that this caused delays in a schedule.

The present case turns entirely upon the application of section 10(a) of the contract of purchase. This section establishes the rights of the builder in obtaining extensions and the consequences of his ability to meet the closing dates fixed. Section 10(a) envisages two situations which allow for changing the date of closing:

1. Reasons for failure to complete construction which are within the vendor's control;
2. Reasons which are outside the control of the vendor.

Under reasons within its control, the vendor is granted the right to extend the closing date twice upon giving proper prior notice; the first extension can be for up to 120 days upon 65 days prior notice; a further extension of 15 days is permitted upon 35 days prior notice to the purchaser. This right is an absolute one in the sense that the vendor can at any time avail himself of his right to extend the closing date so long as he gives the proper notice.

Where the vendor has no further rights to unilaterally extend the delay, he may invoke as a defence against any claim for failure to meet the closing date the fact that the closing date was delayed for reasons beyond his control.

Counsel for the Program has argued that the burden of proof is on the purchaser to establish that the vendor was not delayed for reasons beyond its reasonable control. The Tribunal cannot accept this contention since the onus must be on the vendor to establish his defence. Furthermore, knowledge of the facts giving rise to such a defence could not be reasonably expected to be known by the purchaser, but of necessity would have to be known by the vendor. It would thus be unreasonable for the burden of proof to fall on any other party than the builder once the purchaser has established the failure of the vendor to deliver within the closing date stipulated.

In the present case, since the purchaser has established the failure of the vendor to meet the closing dates fixed for reasons within his control, the burden of proof falls upon the vendor to establish that he was entitled to a reasonable extension of time because the delay was caused for reasons beyond his control. In this regard, section 10(a) gives very clear examples of the type of reasons which would be acceptable. These examples

include delays caused by strikes, fire, civil insurrection, floods or Acts of God and other events of force majeure. The causes cited by the builder, therefore, cannot be minor in nature and of a nature which would not be reasonably anticipated.

Has the vendor established that the delay was for reasons outside his control and that these reasons constituted force majeure?

The Tribunal finds that the decision to appeal to the Ontario Municipal Board would be a reason outside the control of the vendor and would be significant enough to constitute a force majeure in that the construction project would of necessity be delayed until the judgment by the Board. That this would further require the construction to take place during severe winter conditions would also constitute a force majeure causing delays. But all this was known by the builder at the time he gave his second notice on May 5, 1992. At such time, these reasons could no longer be invoked by the builder as force majeure for any further delay in meeting the closing date fixed. In this regard, knowing all the foregoing, the builder chose to contract the delivery date to June 11, 1992. The Tribunal must conclude that the builder no longer considered them factors affecting its schedule.

Despite this, the builder on May 5 could have sought a second extension to July 20, 1992 had he so wished. And it is clear from the testimony of Mr. Lewis that he would have been more satisfied with extending the delay for closing rather than contracting it. The builder, however, made his choice and has to accept the consequences thereof. His only defence is that any further delay in closing was the result of a force majeure resulting from reasons beyond his control. And these must be new reasons which occurred after May 5, 1992.

The reason cited by the builder at trial comes down to inspections not having been carried out because of too many units having to be inspected within too short a period of time. Did this constitute force majeure? The Tribunal thinks not. That such delays could occur should have been anticipated by the builder and in fact from the testimony of Mr. Lewis, he did, in fact, realize that the delays were too short. The builder was well aware or should have been aware that numerous inspections are required before closings and could reasonably be expected to lead to delays. In the face of this, even though the builder could have extended the closing on May 5 to a date within which he could have with great ease delivered the unit, he chose instead to shorten the delay for closing. Delays of the nature cited by the builder do not constitute force majeure. In this regard, had the Building Inspectors gone on strike during this period, the builder could

have cited that as a reason beyond his control which constituted force majeure; however, in the absence of such a strike, the delays which occurred would not constitute an event of such magnitude as to constitute force majeure. To hold otherwise would be to grant the builder an abusive power to extend closing dates at will. This would go completely against the aim of the Ontario New Home Warranties Plan Act which seeks to protect purchasers from having to wait indefinitely for units purchased.

Under the circumstances, the builder has not proved that the delays in closing were caused for events which were outside his control. Under section 10(a) of the contract, therefore, the vendor was obliged to return the deposit to Mr. Turner with interest as prescribed by the Act, and the agreement itself was stipulated to be at an end.

The purchaser was, therefore, completely within his rights to ask back his deposit. He had no obligation to proceed with the closing even if the delay was only three days. The vendor has only itself to blame for not giving proper prior notice of a second extension for closing and it was well within its delays and had the power to do so. Moreover, the builder chose to do this despite the fact its general supervisor of construction would have preferred the delay for closing to be extended because he anticipated delays in inspections occurring because so many closings had to be carried out in such a short period of time.

Once the builder chose to impose a closing deadline of June 26, 1992, it was contractually obliged to meet that date. Its failure to so do gives Mr. Turner the right to reimbursement of his deposit.

Accordingly, by virtue of the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to reimburse to Mr. Turner his deposit of \$10,000.

The above decision was appealed to the Ontario Court (General Division) Divisional Court. The appeal had not been concluded at the time of this publication.

URBANETICS LIMITED

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
LUCIENNE BUSHNELL, Member
D.H. MACFARLANE, Member

APPEARANCES:
GLENN R. SOLOMON, representing the Applicant
BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATES OF HEARING: 23, 24, 26, 27 September 1991;
8, 14, 15, 16, 17 September, 30 November;
1, 2, 3, 4, 14, 16, 17, 18 December 1992;
3, 17, 18, 19, 20, 21 May,
16, 17, 18, 19 August;
20, 29 October; 2 November 1993.

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal by way of an appeal by the Applicant from a Proposal issued by the President/Registrar of the Ontario New Home Warranty Program on September 10, 1990 in which he stated:

The Registrar gives notice of his proposal (the "Proposal") to refuse to renew your registration for the reasons shown on the **reverse** of this notice.

On the back of the notice is set out:

1. The past conduct of Mr. Chris Teron and Mr. William Teron directors and officers of Urbanetics Limited affords reasonable grounds for belief that the applicant's undertakings will not be carried out in accordance with law and with integrity and honesty, TO WIT:

As directors and officers of Teron International Urban Development Corporation Ltd., Mr. Chris Teron and Mr. William Teron permitted that company to violate its statutory obligations which led to the Ontario New Home Warranty Program having to pay out of its Guarantee Fund the total sum of \$1,524,824.89 for warranted repairs. This all being contrary to the provisions of Section 4(4) subsection (2) of the Vendor/Builder Agreement executed by the above company.

(see Exhibit 17, tab 9)

OUTLINE OF THE FACTS:

This action was taken by the Registrar pursuant to Section 7(1)(c) of the Act. The Registrar gave notice to the Applicant pursuant to Section 9(1); the Applicant required a hearing pursuant to Section 7(4); the hearing is being conducted pursuant to that subsection; and the Applicant's registration is continuing pursuant to Section 7(8) until the Tribunal shall have made its order.

The Registrar's Proposal is based upon the allegation that Teron International Urban Development Corporation Limited (hereinafter called "Teron" owes to the Program \$1,524,824.89 for which it had been invoiced to reimburse the Program for monies paid out by it to Carleton Condominium Corporation #256 upon a settlement of certain claims for deficiencies in condominium buildings built by Teron which are alleged to have been deficiencies in common elements in this building as governed by Section 15 of the Act.

The buildings in question were two towers at 111 Echo Drive and a number of townhouses constructed by Teron at a location described as Canal 111 in Ottawa. The deficiencies with which we are concerned were in the towers and a somewhat detailed description of these buildings is in order. Exhibit 18 is a colour photograph of the north side of Tower A which is the northerly tower and Exhibit 20 is a black and white photo of the north side of Tower B, being the easterly or southerly tower. Exhibit 24 is a floor plan of the third and fourth floor of Tower A, the north tower. The construction of the two towers is substantially similar. Each is six stories high with three condominium units on each floor.

The unit numbers run from 1 to 6, from south to north on each floor as indicated by numbers 10 to 60 before these numbers on each succeeding floor as one goes up so that units 101 to 601 are one above another at the most southerly end of the south building. 201 to 206 are in the middle of that building, 301 to

306 are at the north end of that building and 401 to 406, 501 to 506 and 601 to 606 are found from south to north in the northerly building.

The east, south, and west walls of both buildings are of brick construction with a number of windows looking into each unit which they enclose and the north walls of both buildings are almost all windows which are described as curtain walls. These are of two types, called curtain wall 1 and curtain wall 2, both of which extend the full height of six stories in all cases. As one looks at both buildings from the north, the curtain wall in front of the two end tiers of units (with numbers 10-30-40-60, are curtain wall 1 and the two in the middle tiers with numbers 20-50- are curtain wall 2). One of the distinctions between the two types of curtain walls is that in curtain wall 1, the glass is put in from the inside and with curtain wall 2, it is put in from the outside.

The Declaration and Description contemplated by section 15 of the Ontario New Home Warranties Plan Act is Exhibit 65. It was registered on October 17, 1984 and the one year period for making claims against the Program stipulated in section 13(4) of the Act commenced to run on that date. The only party whose claims form the subject matter of the issues herein is Carleton Condominium Corporation #256 as the only defects in the building with which we are concerned are defects in common elements. We shall, however, be concerned with notice of certain defects given to the Program by unit owners during the warranty period of one year. Also here we are concerned only with claims for deficiencies which fall within section 13(1) of the Act which must be made within one year upon the Program under section 13(1) and (4) of the Act.

13.(1) Every vendor of a home warrants to the owner,

(a) that the home

- (i) is constructed in a workmanlike manner and is free from defects in material,
- (ii) is fit for habitation, and
- (iii) is constructed in accordance with the Ontario Building Code;

Section 13(4) of the Act provides:

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect...

During the course of his argument at the conclusion of the case, counsel for the Program attempted to advance a claim against Teron on the basis that the defects in the building with which we are concerned amounted to major structural defects. The Tribunal ruled that, at that stage it was not open to him to do this.

It dealt with this point in the following terms:

The respondent now seeks to advance a claim against the appellant on the basis that the defects in these buildings amount to major structural defects. The Tribunal is of the view, that at this stage in the proceedings, it is not open to the respondent to do so.

Throughout the whole of its dealings with the matter prior to this hearing, the Program dealt with these defects as coming within Section 13(1)(a) and not Section 13(1)(b). On June 3, 1988, the Program advised the condominium corporation by letter of the defects which it was prepared to correct. This is found at tab 29 of Exhibit 16. There is no suggestion that any of these defects constitute major structural defects.

On November 29, 1989, the Program wrote to the condominium corporation a letter which its witnesses said was a decision letter found at tab 39 of Exhibit 16. It is written under the reference "re claim for first year defects received November 8, 1989".

The main witnesses for the Program on this point were Mr. Walker and Mr. Maling. The evidence of Mr. Walker was clear that the complaints here were not of major structural defects and that they came within Section 13(1)(a). Mr. Campbell concedes that Mr. Maling's evidence was to the same effect.

Mr. Solomon makes the argument that if the Tribunal now considers this claim his client has been seriously prejudiced as, if he had believed it was facing such a claim, he would have called evidence and presented a defence to it.

It is our view that the Program cannot make this new claim at this stage in the proceedings.

In order to enable it to identify and make claims upon the Program for deficiencies which must be reported within the one year limited, the Condominium Corporation retained a firm of architects in Ottawa, Messrs. Otto and Bryden and specifically Mr. Otto to make what is known as a Technical Audit of the building. The results of this was contained in a report thereof which was dated August 22, 1985 and a copy of which is Exhibit 25 herein. On the first page, the Terms of Reference of the audit are stated to be:

CANAL 111 REPORT

1 TERMS OF REFERENCE

This report was authorized by the Board of the Condominium to make a general review of the project from a technical compliance and performance point of view. Such a report is normally referred to as a technical audit and includes the following areas of investigation.

1. The subject of the report is all common elements shared by the Condominium.
2. Compliance with Building Codes and authorities having jurisdiction is investigated.
3. Conformance with working drawings and specifications is reviewed.
4. An assessment of the performance of the common elements is made by a visual inspection.
5. Details found on the drawings and on the site are reviewed for expected performance.
6. Areas of further investigation are recommended if required.

The results of the investigation and analysis are described in the report together with any recommendations for immediate or future action as required. The results of the investigation can be used at the discretion of the Board and further consultation with the Architect or Engineers may be required to determine the best course of action. It is highly recommended that the Board also seek legal advice before commencing with any actions against the Developer other than the normal warranty obligations under his contract.

3.9 Windows & Glazing

With the exceptions noted below the windows and exterior glazing appear to be sound. The problems that we have inspected concern the infiltration of water at the sloped glazing of the greenhouse units on the 6th floor. It is as yet unclear to us whether the water is entering the window frame members or through the flashing surrounding the window units themselves. It appears more likely from the evidence of the entry point of the water that the leak is occurring at the flashing. A hose test of these units as mentioned earlier would be the best procedure as an initial step to try to determine where the leak is actually occurring.

The second problem concerns the large casement windows in the curtain wall of the apartment buildings. These appear to have been added into the main frame and specially adapted for this installation. The actual installation is not completely successful since those casement windows inspected show severe stress on the hinges, the flush bolts holding the second panel in place and on the latching device. In

some instances these have been broken. The operating hardware on these casements should be reviewed and improved upon in order to correct present deficiencies and to prevent future ones from occurring. The casements themselves also appear to be leaking and this is caused we believe by the absence of a proper cap or flashing over the head of the casement unit. The water running down the curtain wall can easily enter the casement frame and run down the jambs to come out in the form of water leakage at the sill at the base of the casement unit. Water leakage is evident there and more than likely occurs as described.

Improvements to the hardware should improve the overall performance of the windows including gaps which presently exist which allow for excessive air infiltration. There are places where daylight can be seen through the joints in the window. The casement windows investigated were not equipped with screens. Screens are specified and should be provided. Because the casement units appear to have been adapted especially to the curtain wall, there may be some difficulty in providing sufficient reveal in the frame to install the screen.

A copy of this audit was not, however, forwarded to the Program, but rather a summary was made of it and this was forwarded by a letter dated September 9, 1985 listing 141 deficiencies. A copy of this letter and of the summary enclosed is found at tab 2 of Exhibit 16. A further list of 23 new items were reported on May 7, 1986, but this was clearly outside the one year period limited.

The only items among the 141 reported on time by the Condominium Corporation which can be related to deficiencies in the curtain wall and window systems which are the basis of the Program's claims herein are:

- 28. Parapet flashing needs additional securement
- 34. Repair flashing/shelf angle detail
at 6th floor sloped glazing
- 40. Repair hardware on casement windows
of tower units
- 41. Repair leaks on casement windows of
tower units
- 42. Supply screens to casement windows of
tower units
- 52. Reverse slope of some ground unit
patio door flashings

In addition to this notice of claims given to the Program by the Condominium Corporation within the time prescribed, there was notification given to it within that time by two unit holders which must be considered when applying section 13(4) of the Act to the relevant facts. At tab 1-D of Exhibit 60 is found a document headed "Certificate of Completion of 30 days Hudac inspection" for suite 506 owned and occupied by one T.A.P. Eyre who was a member of the Board of Directors of the Condominium Corporation. Item #6 on that list reads: "6. The kitchen and living room windows still leak." This document is dated March 15, 1985. At tab 9 of Exhibit 60, we have a letter to the Warranty Program dated July 5, 1985 from solicitors for Mrs. Frances Hartman, the owner of suite 504 with a list of deficiencies, one of which is, "there is a leak at the kitchen window glass - two panes on the right side."

It is to be noted that, while as we would expect in buildings of this size there were a substantial number of deficiencies brought to the attention of Teron International by unit holders, all of these appear to have been remedied satisfactorily by Teron International and in no case did any of these complaints go so far as to stage a conciliation pursuant to the Act and the only real difficulties experienced were by the Condominium Corporation with regard to common elements.

We shall next set out an outline of the factual happenings dealing with the problem and then proceed to discuss the facts in some more detail in connection with references to the evidence of various witnesses and to certain exhibits.

The first action of consequence taken by Teron International to deal with the problem of water leaks in the buildings through the curtainwalls on the north side was to get a report from Trow Inc., Consulting Engineers as to the causes of these leaks and what should be done to repair them. This company delivered a report to Teron International dated May 8, 1986, a copy of which is found at tab 11 of Exhibit 17. The principal findings and recommendations made by Trow concerned deficiencies in masonry work and flashings above the window systems across the two buildings and advice as to repairs to be made. Teron International had this work done at a cost of some \$70,000 and it appears to have been successful in that leaks did not continue from these sources. However, water leaks did continue through the curtainwalls and window system on the north elevation of both buildings and Teron International commissioned another study and report from a firm of consulting engineers, Messrs. Morrison, Hershfield. That firm's report is dated October 7, 1987 and a copy is found at tab 12 of Exhibit 17.

The Executive Summary on the first page of this report reads:

Morrison Hershfield Limited was retained by Teron International to investigate the cause of numerous reports of rain penetration problems through the curtainwall system of both six storey buildings at 111 Echo Drive, Ottawa, Ontario.

This investigation has identified several deficiencies in the exterior window/wall system of these buildings and includes, a structural problem with the glazing support at the ground floor and two types of aluminum curtainwall glazing systems lacking the fundamental design features required for effective rain penetration control. These features are improper setting blocks for glazing, lack of slopes on sills and mullions, sealed rabbet cavities (no drains) and a general deterioration of caulking and sealants at critical locations.

Conceptual remedial work proposals and recommendations include investigation and repair of the structural support for the glazing at the ground floor, replacement of wood setting blocks with appropriate materials, spandrel panel repairs to prevent them from pushing inside, air/water heal bead sealing of glazing/spandrel panels from inside, and modifications to mullions to weep/vent all glazing/spandrel mullion rabbets.

It is our opinion that the proposed remedial work will dramatically improve the curtainwall performance, but because it is not possible to improve mullion slopes, there will likely be ongoing maintenance required to some extent.

This report goes on in detail to describe the scope of the work, the examination made of existing conditions and the observations noted and certain tests performed. It then reviews the Trow Report, sets out a discussion in 10 points of the problems and concludes with recommendations as follows:

Based on the discussions in the previous chapter, it is evident that various problems exist with the design of the two curtainwall systems, causing water (rain) to infiltrate to the interior. Since there are two different curtainwall systems within the complex, our recommendations for remedial work will pertain to each curtainwall system independently.

The following are our recommendations for remedial work to curtainwall system CW1:

- 1) Further investigation is required to verify the apparent structural support problem of the curtainwall at the ground floor level. Our suspicions of a settlement problem are based on discussions with your site representative and the negatively sloped window sills at ground floor level, resulting in the ponding of water adjacent to the window glazing.
- 2) Water penetration at the metal spandrel panel locations can be alleviated by either of the following two approaches:
 - i) Structurally support the existing metal sandwich panel by fastening it to the aluminum framing, or
 - ii) Install a new metal spandrel panel cover to the outside surface of the mullions and sealing the perimeter with a caulking compound.
- 3) The 'face seal' design approach requires that the exterior caulking be constantly maintained in proper condition to perform its intended function. We, therefore, recommend resealing all mullion corners and all vertical and horizontal joints.
- 4) A heel bead should be applied to all glazing units within this curtainwall system to inhibit the infiltration of water and air within the horizontal framing elements. Further, holes should be drilled at the bottom of the exterior mullion to vent and drain trapped water from the framing system.

- 5) Remove and replace existing masonite (wood) setting blocks with appropriate neoprene setting blocks (durometer 80-90, shore A hardness).
- 6) Verify all interfaces, joints, and connections in the vicinity of all sloped glazing. These areas generally tend to be the prime locations for water to enter the framing system due to the complicated connections.
- 7) Verify and correct all vertical joints between the glazing and the masonry walls for air/water seal deficiencies.

The following are our recommendations for remedial work to curtainwall system CW2.

- 8) Remove all horizontal metal caps and pressure plates.
- 9) Verify that the inside air seal is satisfactory and heal bead the window glazing where necessary.
- 10) Replace the masonite (wood) setting blocks with appropriate neoprene setting blocks (80-90 Durometer, shore A hardness).
- 11) Drill holes into all pressure plates and horizontal mullion caps to drain water and to vent rabbets.
- 12) Reinstall all pressure plates and metal caps and reseal for air and water tightness.

The report concludes with a summary to the effect that:

We have carried out an investigation of problems reported with the curtainwall systems of two six-storey structures at 111 Echo Drive, in Ottawa, Ontario. Our emphasis was primarily on the identification of water leakage problems since a previous report has identified some structural detailing problems and air leakage problems through the exterior wall facade.

Our investigation revealed that the water penetration problem is the result of several design deficiencies in the curtainwall systems. We have recommended and outlined conceptual remedial work that should be performed on each curtainwall system to effectively alleviate the water (rain) infiltration problem.

Teron International then proceeded to have work done as recommended by this report, but did not get on with it as quickly as it would have been much better to have done. In the meantime, a good number of letters had passed among the Warranty Program, Teron International, the Condominium Corporation and certain individual owners and a number of meetings had taken place. Up to June 3, 1988, the relationship between the Warranty Program and Teron International was quite good, but on that date it took a dramatic turn for the worse. Without any warning or explanation for its change of position on the part of the Program, Teron International received a copy of a letter written by the Program to the Condominium Corporation in the following terms:

June 3, 1988

Carleton Condominium Corporation #256
52 Concord Street North
Ottawa, Ontario
K1S 0Y6

Attention: Mr. Eyre

Dear Sir:

Re: C.C.C. #256
Our Ref: 01-9688-25717

Further to your last letter of May 9, 1988 and Mr. Maling's telephone conversation with Marie Leeson this a.m., this will advise you of the present position with respect to Mr. Phil J.

Villeneuve's (President) claim dated April 27, 1988.

With regard to the matters the Ontario New Home Warranty Program considers it to be covered under Teron International's warranty, the attached list of Schedule "A" items should be placed for quotation and prices obtained. These quotations should then be submitted to the Program.

With respect to these items the Program will pay to C.C.C. 256 all reasonable costs to the limit of the warranty.

Upon the provision of a specification developed from the site inspection carried out by Mr. R.C. Quirouette B.Arch.M.O.,A.A. of Morrison Hershfield Ltd. Consulting Engineers dated October 7, 1987, we would require a tender as to the method of repairs and any costs incurred therein. With respect to water penetration at 111 Echo Drive all reasonable costs will be paid.

With regard to the other items on the attached Schedule "B" list, Mr. Robert Maling will write to you shortly explaining the Program's position.

Yours truly,

Peter Walker
Technical Representative
c.c. Teron International

Attached to this letter was the Schedule "A" in the following terms with the numbering system of the original summary of the technical audit which had been used in the intervening correspondence dealing with these items:

SCHEDULE "A"

- 23. The crack between the pre-cast and brick is to be repaired with flexible material. This was accepted by the builder as a deficiency, but remedial work has not been completed.
- 38. The waterproofing of the parking deck expansion joints is to be repaired or replaced.
- 41. There are leaks in the casement windows of the two Towers. This also has resulted in broken seals in the casement windows.
- 56. There are leaks from the parking deck slab in the vicinity of the Townhouses. This also has resulted in certain cracks in the garage roof.
- 59. Leaks in the exterior wall of the electrical room have not been repaired.
- 93. There are leaks in the basements of various Townhouses including, without limitation, Townhouses Nos. 5 and 9.
- 108. There are leaks in Tower A in the vicinity of the fire exit corridor. (See also the leaks referred to in items N.1 and N.9).
- 109. Noises created by the jacuzzis in the two Towers requires to be remedied.
- 118. There is a humming noise in the fan in the ladies locker room.
- N.7 The repairs to the basement garage entrances to Townhouses Nos. 11 and 12 have not been completed and ingress of water continues from above.

It is to be noted that, while this letter instructs the Condominium Corporation to go out and have specifications developed based on the Morrison Hershfield recommendations and then get tenders as to the method of repairs and costs incurred therein, the items listed in Schedule "A" do not relate, except for item 41 to these recommendations. In the Schedule "B" to which reference is made in the letter, there are 14 items, none of which relate to the Morrison Hershfield recommendations. All of this seems very peculiar.

Equally peculiar was the reaction of both Teron International and the Condominium Corporation to this letter. This letter was an almost 180 degree turn in the direction being taken

in dealing with Teron International by the Program and certainly should have "put the wind up". However, that company did nothing until August 22, 1988 when it wrote to the Program simply noting that there had been no recent correspondence, stating it was surprised by the letter of June 3, because of work it had completed to which it referred and questioning how the Program could support the Condominium Corporation in these circumstances.

On its side, the Condominium Corporation did not carry out the instructions given it by the Program to have specifications and a tender prepared on the basis of the Morrison Hershfield recommendations, but rather went back to Otto & Bryden and had Mr. Otto make a new recommendation which came out to the effect that all of the windows and every pane of glass on all four sides of both buildings should be pulled out and replaced including all of the sliding doors in the curtainwalls of which no complaint had ever been made, many of the windows on the other three sides of which no complaint had ever been made and all of the repairs which Teron International had made to the curtainwalls up to that point. These recommendations are set out in a letter from Mr. Otto to the Condominium Corporation dated May 11, 1989. At the conclusion of this letter, Mr. Otto advised the Condominium Corporation "Since this is a very drastic step to take you will require some correspondence with the New Home Warranty Program with regard to this issue and we would be pleased to assist you with any further technical comments that may be required." This letter is found at tab 14 of Exhibit 17. The peculiar course of events continues because the Condominium Corporation completely ignored this last piece of advice and went ahead and got specifications covering the replacement of all of the windows and other items including investigation of noise intrusion due to whirlpool bathtubs and rooftop chillers as unconnected with the Morrison Hershfield recommendations as most of the items in the aforementioned Schedule "A". A copy of these specifications were sent by the Program to Teron International by letter of August 7, 1989 with the advice that the Condominium Corporation was going to get costs on these specifications and on the basis of the same, the Program would decide on a cash settlement with the Condominium Corporation. Even this did not bring any response from Teron International until the letter of August 22 aforementioned.

On August 10, 1989, the Program wrote to the Condominium Corporation (tab 34 of Exhibit 16) advising it had reviewed the specifications and found them to be in order (in spite of the fact that they departed completely from its own instruction to follow the Morrison Hershfield recommendations with no explanation for doing so and in spite of the fact that they contained items which could not possibly be related to warrantable defects). This letter

went on to ask that the specifications be sent out for tenders and enclosed a Condominium Form Claim to be filled out when an amount had been ascertained.

On November 1, 1989, the Condominium Corporation wrote the Program advising it had five tenders on the new specifications as follows:

Magus Construction Ltd.	-	\$1,944,000
G.R. Brune Construction Inc.	-	\$1,528,000
Garvey Construction Ltd.	-	\$1,730,000
Frecon Construction Ltd.	-	\$1,515,000
H.K. Phillips General Contractors Inc.	-	\$1,344,660

The letter goes on to ask for concurrence to enter into a contract with Phillips for \$1,344,600, for eventual payment of this sum by the Program, plus \$23,930 for Otto & Bryden's fees in connection with these specifications and \$1,200 for estimated future expenses. Phillip's tender is found at tab 35 of Exhibit 16 in a letter dated October 23, 1989 to Otto & Bryden and a form attached to it.

In response to a request from Otto & Bryden, Phillips wrote that firm a letter on November 17, 1989 setting out details of its price breakdown in the follow terms:

Further to your written request, dated November 13, 1989, we are submitting the following price breakdown for "Scope of Work" items (1) through (9).

- (1) ROOFING
To replace roofing on entry/lobbies
in buildings A & B for the sum of \$20,420.00
- (2) FLASHING REPAIR
new flashing to front door sills
in townhouse units for the sum of \$ 3,255.00
- (3) ...ELLING
To replace approximately 450 m2
for the sum of \$14,652.00

- (4) WATERPROOFING REPAIR
waterproofing at expansion joints
...including all related items
the sum of 6,905.00
- (5) PAVERS
add pavers as per drawing SK-4
of 840.00
- (6) REPLACEMENT
replace all exterior windows and
doors in towers A & B with the exception
of entrance lobbies
repairs 1,134,577.00
Repair Allowance 100,000.00 1,234,577.00
- (7) WHIRLPOOL BATHTUBS
Sound transmission repairs as per
specifications for the sum of 36,652.00
- (8) CHILLER UNITS
Repairs to reduce sound transmission as per
specifications for the sum of 26,711.00
- (9) EXTERIOR CAULKING
Clean out mortar joints and install rope
backing and caulking for the sum of 4,648.00
1,134,660.00

This addition is incorrect by \$200,000 and on the copy which we have at tab 37 of Exhibit 16, someone has inserted in handwriting the correct figure of \$1,344,660.00.

On November 29, 1989, the Program wrote to the Condominium Corporation a letter found at tab 39 of Exhibit 16 which was stated to be the "decision letter" herein if there was one in this matter. This letter reads as follows:

Re: Claim for First Year Defects received November 8, 1989

Dear Mr. Ogilvy:

This letter acknowledges receipt of your claim and shall also serve as the Warranty Program's decision in keeping with Section 16 of the Ontario New Home Warranties Plan Act.

The referenced Act came into effect on December 31, 1976, and provides certain limited warranty protection for purchasers of new homes. The Warranty Plan provides that for one year following the date of possession by the first owner, the vendor warrants that the home is built in a workmanlike manner, is free from defects in material, is fit for habitation, is constructed in accordance with the Ontario Building Code and, is free of major structural defects. In addition, major structural defects (only) are covered for a further four years following the vendor's warranty.

Claims with respect to the one year vendor's warranty and four year major structural defect warranty must be submitted, in writing, to the Warranty Program within the applicable warranty period. The Program is then required to review the claim and provide a decision and written reasons to the claimant. A person receiving a decision is entitled to a hearing before the Commercial Registration Appeal Tribunal if he mails or delivers, within fifteen days after the decision is served, notice in writing, requesting a hearing to both the Warranty Program and the Tribunal. The Tribunal's address is: One St. Clair Avenue West, 10th floor, Toronto, Ontario, M4V 1K6.

With respect to your claim submission, of November 2, 1989, the Ontario New Home Warranty Program agrees to pay Carleton Condominium Corporation #256 a total sum of One million, three hundred and twenty five thousand, nine hundred and thirty four dollars and sixty-nine cents (\$1,325,934.69) in consideration for the warranted items as set out in schedule "A" of our conciliation report of June 3, 1988.

Your submitted claim amount has been reduced by the following:

1. \$26,711.00 for chiller unit repairs (not warranted).
2. \$14,652.00 for garage floor levelling (not warranted).
3. \$2,495.31 for engineering fees not relating to this claim.

Please find enclosed a full and final release form for your use and information. We ask that you complete it as required and return it to our offices.

The Program will then initiate partial payments, upon receipt of invoices (submitted to yourselves from the contractor) up to the maximum claim amount. Please keep us advised as to your intended work schedule for our periodic review of ongoing repairs.

If you have any questions, please do not hesitate to call.

The Condominium Corporation then executed a "Full and Final Release" based upon this conclusion and forwarded it to the Program by a letter of December 20, 1989 (found at tab 42 of Exhibit 16). Also with this letter were enclosed 12 invoices from Otto & Bryden for consulting or supervisory work totalling \$24,780.08, with a statement from Otto & Bryden that \$2,495.31 of this was attributable to fees for roof anchors and not covered by the Program's decision. The Condominium Corporation asked for reimbursement of the difference, namely \$22,284.69. It is to be noted that nothing with regard to such an item of account with Otto & Bryden was included in any of the figures making up the total allowed in the decision letter or covered by the release. Nevertheless, on February 8, 1990 the Program issued its cheque to the Condominium Corporation for \$24,780.08, covering not only what it was asking but also what it specifically said was not owing. The Program then on February 8, 1990 invoiced Teron International for the \$24,780.08, plus 15% for its administration charges for a total of \$28,497.09 (see tab 45 of Exhibit 16). No question appears to have been raised by the Program as to whether all, or any part of this payment requested was properly paid.

Then on April 19, 1990, the Program sent to the Applicant Urbanetics Limited the following letter:

Re: Builder Number 01-88
Renewal of Registration

A review of your file has been conducted and we note your previous involvement with Teron International Urban Development Corporation Ltd. formerly registered with the Program wherein Mr. Chris Teron and Mr. William Teron were principals/officers/directors.

The purpose of this letter is to advise that your renewal of registration will not be approved at this time in view of the outstanding claim related to Teron International Urban Development Corporation Ltd. We refer to Carleton Condominium Corporation #256 and the cost incurred to date by the Program is \$28,497.09 to correct warranty items. We require full payment before any further consideration can be given to this renewal.

Please contact this office within 15 days of receipt of this letter to resolve the outstanding issues.

H.K. Phillips and its sub-contractors proceeded with the work of replacing all of the windows in both buildings. On July 6, 1990, the Condominium Corporation wrote to the Program (tab 47 of Exhibit 16) confirming the fact that the Program had confirmed it would pay \$1,325,934.49, acknowledging that it had received \$24,780 and stating that there was a balance coming to it of \$1,301,154.69. This letter went on to say that the original

contract price from the contractor, Phillips, was \$1,303,297, being \$2,142.31 more than the above-noted balance. The Condominium Corporation then went on to submit Payment Certificate No. 1 from Otto & Bryden for \$355,876.65 and asked for \$353,734.34 being the \$355,876.65 less then \$2,142.31 said to have been already received. In looking at all of these figures and the way in which the parties dealt with them, one has to wonder what was in the minds of the persons both in the Program and the Condominium Corporation who arrived at these conclusions.

The strange conduct in dealing with the matter continued. No cheque for the \$353,734.34 was issued. Instead, some additional negotiations were held between the Program and the solicitors acting for the Condominium Corporation whereby an agreement was reached that the Program would pay the total \$1,301,154.61 to the solicitors, Messrs. Nelligan & Power of Ottawa in trust with some provisions that the latter should disperse the monies as against invoices or certificates from the architects. On August 1, 1990, a cheque in this sum was issued by the Program to Nelligan & Power in trust. (see tab 48 of Exhibit 16).

On the same day August 1, the Program invoiced Teron International for this sum plus 15% for administration charges for a total of \$1,496,327.80.

In the meantime, the Program had retained another firm of engineers, Suter Keller Inc. to monitor the dismantling of all of the windows in the two buildings and their replacement and provide it with evidence which it wanted to confirm that the decision had been correct and justified to go the route of replacing all of the windows. This company delivered a report to the Program dated February 25, 1991, which is found at tab 16 of Exhibit 17. This report opens with these paragraphs:

Early in 1990, Suter Keller Inc. was retained by the Ontario New Home Warranty Program (ONHWP) to review and monitor the replacement of the existing curtainwall system at the two 6-storey apartment buildings forming part of condominium CCC 256 also known as Canal 111.

The ONHWP had made funds available to replace the curtainwall system following investigations by several consultants into persistent water penetration problems. The consultants had concluded that design deficiencies were the primary cause of the problem and the architect retained by the Condominium Corporation concluded that the best solution would be to replace the existing curtainwall rather than retrofitting it. Suter Keller's mandate was to determine the validity of replacing the entire curtainwall or whether extensive remedial measures would have been more appropriate.

It ends with this conclusion:

Therefore, under the given set of circumstances, we concur with Otto & Bryden's recommendation that the best and likely most cost effective option was to replace the existing curtainwall in its entirety.

It is to be noted, in dealing with this report that it does not deal with any of the windows in the buildings other than those forming part of the curtainwall on the north elevation.

Having submitted this report, Messrs. Suter Keller submitted an invoice to the Program on February 6, 1991 under the heading "Curtainwall Replacement". (This reference underlines the point made above that they only dealt with the window systems on one side of both buildings). This invoice totalled \$15,201.01. On February 27, the Program issued its cheque to Suter Keller Inc. for this sum, and the same day invoiced Teron International for this sum plus 15% for administration charges plus 7% G.S.T. on these charges for a total of \$17,640.77. While these three sums invoiced to Teron International total \$1,542,465.66 and not the sum of \$1,524,824.89 set out in the Notice of Proposal herein, they are essentially the items upon which the Registrar's case is based.

REVIEW OF THE EVIDENCE GIVEN BY THE WITNESSES WITH REFERENCES TO THE EXHIBITS

We propose next to review in a little more detail the evidence as it was given by the witnesses called. The first witness for the Program was Peter Walker, a Technical Services representative of the Program who was the principal officer dealing with this matter from May of 1987 when he took over from Mr. Maling (who was later called as a witness) and August 1989 when he was replaced. He outlined much of the information set out in the foregoing outline of the facts. Mr. Walker organized what he termed a conciliation meeting held at the premises on May 25, 1987 following which he wrote a nine page letter to the Condominium Corporation with a copy to Teron International (see tab 17 of Exhibit 16). In his letter to Teron, he said the meeting was held "to start the process of conciliation" (see tab 18 of Exhibit 16). Although no representative of Teron was present, Mr. Walker had met with Mr. Chris Teron on May 22 and reviewed the problems. The result of this meeting was that Mr. Walker wrote under item 41 (the number of the complaint concerning the casements windows in the original list):

41 The Condominium Corporation complained that there are still leaks in the casement windows of the tower units. The builder has attempted to repair these leaks but admitted that he cannot find the exact problem. At the meeting with the builder on Friday May 22, 1987 I was informed that a report from a consulting engineer would be delivered very shortly and once this was delivered the builder would go ahead and do the necessary repairs. We still await this report. It was agreed, by the Condominium Corporation Board members present at this meeting, that the builder should repair the leaks as soon as possible.

Mr. Teron responded with a letter of July 2, 1987 (tab 19 of Exhibit 16) in which he said under item 41:

41. As I mentioned in our meeting, I will send you the engineer's report as soon as I receive it. It will address all forms of leaks in the front face of the building.

As a result of continued pressure from the Condominium Corporation, Mr. Walker convened another meeting on August 26, 1987 at the premises which was attended by representatives of all parties. He wrote a report of the meeting being a letter found at tab 22 of Exhibit 16. This letter states that Teron would submit a progress report every four weeks and if these were not satisfactory to the Condominium Corporation, a decision letter would be forthcoming from the Program. Mr. Teron again said he expected the engineer's report very shortly and that work would start immediately thereafter. The letter went on to say that of some 48 deficient items noted at the June 22 meeting (listed at tab 17 of Exhibit 16), all but 12 listed in that letter had been completed and no longer constituted complaints.

Mr. Walker referred to the first of the progress reports dated September 28, 1987 (tab 24 of Exhibit 16) in which two items of concern with window leaks are set out:

Windows leaks

The engineers have completed their work but have not sent us their written report. They tell us that it will be ready tomorrow. Until I have seen it, I cannot comment on this issue. I will send a separate letter with our answers in the next few days and will not wait for the next three weekly report.

41. Casement windows

This work will be done at the same time as the main window work.

It is to be noted that while the only report of deficiencies made to the Program within the one year of the warranty was regarding casement windows, Teron was dealing in the context of this report and the work they were doing with window leaks on a wider basis.

On October 27, 1987, Mr. Arnold Eyre who signed himself as Maintenance Director of the Board of the Condominium Corporation, wrote to Mr. Walker (tab 25 of Exhibit 16) and listed 26 of the complaints as still outstanding, although Mr. Walker's letter of August 28 stated that all but 12 had been remedied.

The second progress report from Teron International is dated October 30, 1987 and deals with these items:

Windows leaks

I have enclosed the engineer's report. It has been very useful but has not given us specific enough solutions to enable us to start the work. They will be able to do this when we provide original shop drawings of the frames. On Nov 2, the trade who installed the systems will be with us on site with these drawings and will estimate the schedule to repair.

41 Casement windows

This work will be done at the same time as the main window work.

(tab 26, Exhibit 16)

Mr. Eyre responded to Mr. Walker's letter by one of January 4, 1988 in which he goes back to a great many of the deficiencies which Mr. Walker had stated the meeting had agreed were remedied and which no one else said were not and demands an end of "the endless hassling and get our deficiencies rectified. He then demands a decision so that the Condominium Corporation may pursue some other action.

Mr. Walker told of the Program's receiving the Morrison Hershfield Report from Teron International and reviewing it and coming to the conclusion that it was adequate and that Teron should proceed to carry out its recommendations. He stated on cross-

examination that he was instructed by Mr. Maling to write the letter of June 3, 1988 (found at tab 29 of Exhibit 16) and further that, up until the time he was so instructed it was his view that Teron International was carrying out its warranty obligations. For some time thereafter, he continued to tell Mr. Chris Teron that, notwithstanding the position taken in a letter of June 3 to the Condominium Corporation, the Program would continue to deal with Teron International and on August 30, 1988, he wrote to Mr. Teron offering to arrange a meeting to bring him up to date (tab 32 of Exhibit 16). He professed to be completely at a loss for a reason for the about-face of his superiors in the Program in their dealings with Teron International.

On the question as to whether there ever was a conciliation of this dispute as contemplated by the Act, Mr. Walker said there was "an informal conciliation", but he did refer to the nine page letter at tab 17 of Exhibit 16 as a conciliation report. He agreed that no fee was ever paid by anyone required to initiate a conciliation.

Reference will be made later herein to the question of broken thermopane seals in windows. Some of the expert witnesses deal with this problem, its extent and effect on the conclusions as to the remedial work to be done. Mr. Walker established that the first report as to this problem was contained in a letter to him from the Condominium Corporation dated March 17, 1988 found at tab 11 of Exhibit 23. On cross-examination, Mr. Walker stated that neither Trow nor Morrison Hershfield had found any of these seals broken.

On April 27, 1988, the Condominium Corporation wrote to Mr. Walker (tab 19 of Exhibit 23) stating:

...Notwithstanding repeated efforts on our part, certain of these deficiencies, including in particular, certain major deficiencies, have not been rectified and the performance and efforts of the builder in this regard have been grossly inadequate and totally unsatisfactory.

The letter went on to demand a decision so that the Condominium Corporation could take further action and it enclosed a Schedule with 24 listed deficiencies which it said constituted its then present complaints. In dealing with these in his evidence, Mr. Walker said that when it was received all but 10 were either unwarranted or previously remedied.

Reference will be made later to an issue raised and addressed by both parties as to interference with the Program in this matter by a Provincial Minister of the Crown. When questioned about this, Mr. Walker stated that the Minister of Revenue in whose constituency these residents were, had sought his assistance and he had written to the Minister of Consumer and Commercial Relations, the Minister who reports for the Program, requesting that he look into the matter and give him a report. A handwritten note at the bottom indicates his concern was with the delay in completing the matter. On cross-examination, Mr. Walker stated emphatically that no Minister gave any instructions to the Program as to what disposition to make of the claim and his evidence and the Minister's letter are consistent in this respect.

Mr. Walker admitted that, at the time the June 3, 1988 letter went to the Condominium Corporation with a copy to Teron International, no decision letter had gone out as contemplated by the Act. He said that in the June 3 letter, "We were saying to the Condominium Corporation that if they went out and got an acceptable quote, based on the Morrison Hershfield Report, we would pay".

Mr. Walker admitted on cross-examination that the only one of the ten items listed in Schedule "A" to the letter of June 3 which could have any reference to window leaks was item 41. He also said that the aluminium window screens which Otto & Bryden included in the specification upon which the tenders were got were a non-warrantable item.

Strangely, Mr. Walker said "It was not my job to alert Mr. Maling about the difference between the Otto & Bryden specifications and the recommendations in the Morrison Hershfield Report which the Program had instructed be followed."

In a letter dated October 31, 1989, Mr. Chris Teron wrote Mr. Walker (Exhibit 26) taking issue in some detail with the course being followed by the Program and on November 28, 1989, he wrote again (Exhibit 27) referring to the complete contradictions between the information he was getting from Mr. Walker and from others in the Program and stated that a very serious situation was developing in that, inter alia:

As we understand it, the ONHWP is about to authorize the replacement of all windows in the project including those that have never had a problem and intends to charge this to our account. Your authorization would be for an account in excess of one million dollars. This is on a building that is 5 years old.

To make matters worse, Mr. Moreau advised me that not only will he authorize the work without any explanations or meetings, but that the ONHWP fully intends to invoice us for the work and, should we not pay the invoice for the work unilaterally authorized by it, it will revoke our license. Our only recourse would be an appeal to the CRAT after the license is already revoked. To suggest an appeal after you revoke our license, would create a situation where the damages would be staggering and beyond repair.

On December 4, 1989, Walker replied to Mr. Teron (see Exhibit 28):

Re: Carleton Condominium Corporation #256

Thank you for your letter dated November 28, 1989.

A Decision Letter is being prepared by the Ottawa Regional Office and upon completion, a copy will be forwarded to you.

As I stated in my letter of August 30, 1988, if you wish to attend at a meeting with me in my office in Toronto, I would be happy to bring you up to date as to the status of the file on Carleton Condominium Corporation #256.

However, I would recommend you await the Decision Letter before doing so.

At this point it appears that among the officers of the Program who were dealing with this matter, either the right hand did not know what the left hand was doing or someone was playing games. In any event, on cross-examination Mr. Walker stated that he did not disagree with anything Mr. Chris Teron said in his letter of November 28.

An important issue arises from the manner in which this critical decision was made by the Program. If it had held a proper conciliation as provided by the Act and issued a decision letter in the regular way, either party would have had a right to appeal from the decision at that stage and much of the predicament in which all parties were got later on would have been avoided. On cross-examination, Mr. Walker admitted that the action of the Program in this respect did preclude any appeal at that stage when he was referred to a letter of December 18, 1989 from the Program to the solicitors for Teron (Exhibit 30) in which the Program stated:

The November 29, 1989 decision to which you refer was directed to C.C.C. #256 and the Board of Directors, not to Teron International. The right of appeal lies with them, with respect to our decision, and not with your client at this time.

On cross-examination, Mr. Walker was asked about a meeting which took place on January 24, 1990 in the offices of the Program in Toronto at which were present Mr. Rose, Mr. Stephen Martin, Mr. Ian Johnson, Mr. Dan Moreau and himself on behalf of the Program and William Teron and Chris Teron on behalf of Teron International. Later in the hearing, Mr. William Teron gave some evidence which was very critical of the Program and particularly of Mr. Rose at this hearing. Mr. Walker and Mr. Moreau were the only representatives of the Program at this meeting who were called as witnesses at this hearing. It was Mr. Walker's evidence that no Minutes were kept of the meeting and when questions were put to him as to things which were said at the meeting his response was that he could not recall. There was also put to him certain statements said to have been made in a telephone conversation and set out in a memo by Mr. Teron and his response to this was "I do not recall."

The next witness called on behalf of the Program was Robert Maling who has been with the Program since 1976 and is presently its director of technology. Prior to 1987, he held a number of positions including Manager of the condominium section. He was the person in charge of the file at the beginning when the letter of September 9, 1985 with the summary of the Technical Audit was received (tab 2 of Exhibit 16) until Mr. Walker took over from him. During the time that Mr. Walker was responsible for the file, he reported to Mr. Maling. Mr. Maling said that the overall concern of the Condominium Corporation was the amount of water penetrating into the building and he thought that what was going on was a "band-aid" approach to a major problem.

Mr. Maling said that when the Program obtained a copy of the Morrison Hershfield Report, it expected that a detailed specification would be drawn up to do the repairs based upon it. Mr. Maling referred to the letter of June 3, 1988 as the decision letter and told the Tribunal that he had directed Mr. Walker to write it. His explanation for doing so is of interest and concern. He said that the Program reached the decision because it received an unsatisfactory answer to a letter of April 28, 1988 sent to Teron International (tab 20 of Exhibit 23):

Please be informed that the Ontario New Home Warranty Program requires a detailed report of the status of the remedial repairs that are taking place at 111 Echo with regards to the engineer's report of investigation of water penetration dated October 7, 1987.

Should the Ontario New Home Warranty Program receive no reply to this request within 14 days of this date, the Ontario New Home Warranty Program will issue a contract to finish the said remedial work or make the necessary arrangements to cash settle with Carleton Condominium Corporation #256.

Please govern yourself accordingly, a lack of response to this letter will not sit well with the Ontario New Home Warranty Program and could result in severe penalties to your company.

The "unsatisfactory answer" was contained in the response of May 11, 1988 from Teron International (tab 23 of Exhibit 23):

I received your letter dated April 28, 1988 regarding the water penetration deficiencies at Canal 111. I have delayed responding until now so that I could give you firm answers.

The bulk of the work required involves the curtainwall assembly and this work has been completed on the north tower. The only complaint of leaks since the repair was from suite 505. We have determined that the source of the leak was trapped moisture that accumulated inside the assembly before the repair but thawed after the repair. The resident agrees that there have been no new leaks during the spring.

The same work is required on the south tower. The work is arranged and the crew will start by May 18, just a few working days from now.

As soon as they have finished the curtainwall work they will complete the deficiency items numbered 23, 38, 41, 56, 59, 109 and N7.

In your letter dated April 26, 1988 to CCC 256 you acknowledge items 93, 108 and 118 as still outstanding. Item 93 is leaking inside townhouse basements. We have had no reports of any leaks and therefore cannot address the issue. We believe that 108 and 118 are complete but will inspect them again.

This correspondence is in the same vein as all of the correspondence up to that time and also consistent with Mr. Walker's evidence that things appeared to be in hand and that Teron International appeared to be honouring its warranty obligations.

Unbelievably, Mr. Maling said he did not review the

letter of June 3, 1988 with its Schedule before it went out - this in spite of the importance of the step he was taking, in spite of the drastic change in course he was ordering, and in spite of the fact that he was giving the instructions to a man whom he knew, or certainly ought to have known, had a completely different view of what was going on. Another strange answer given by Mr. Maling was that it was acceptable to the Program that Mr. Otto prepare the specifications rather than Morrison Hershfield. Both he and Mr. Walker said that the Program agreed that the Morrison Hershfield recommendations should be followed to remedy the deficiencies and it had specifically instructed the Condominium Corporation to use Morrison Hershfield to prepare these specifications. Yet when it came back with a different firm (of architects and not engineers) and a set of specifications based on completely different recommendations for remedial work, the Program asked no questions and simply says that this is acceptable. During cross-examination, Mr. Maling was referred to a Review of the Deficiencies as of May 7, 1986 prepared by Messrs. Otto & Bryden and sent to the Program by the Condominium Corporation (tab 4 of Exhibit 16). It lists all original 141 deficiencies and the 23 new ones added. He admitted, that at the time he reviewed all of these only two had not been covered.

29. Add flashing to two roof stacks

41. Repair leaks on casement windows of tower units

He said that he never received any further complaint re item 29 from the Condominium Corporation so, on the basis of this, the only outstanding complaint as of that time was what could be brought under the heading of item #41. This is of significance to the issue of notice as required by section 13(4) of the Act, but, because of other circumstances in the case, is even more significant to the issue of what were really outstanding by way of deficiencies requiring remedial action. On the copy of the list are handwritten notes which Mr. Maling identified as his. In his evidence he said that his notes opposite item 41 were made after he had looked at these windows and the notes read: "Some windows ill-fitted, supplier to adjust and/repair". This obviously refers only to the casement windows.

Mr. Maling did not know just when he got the Trow Report, but he did see it and he got the Morrison Hershfield Report when it came to the Program but he said that when he read these reports, he believed he understood the problem and that the Program got no other expert opinion before deciding to issue the instructions contained in the letter of June 3, 1988 to the Condominium Corporation.

Mr. Maling's evidence throws more light on the making of the decision to pay the Condominium Corporation its total claim. He began by saying he told Mr. Walker to deal with the problem and provide a decision (so far this is consistent with Mr. Walker's evidence and what was in the Minister's letter). However, he went on to say that he told Mr. Walker that, "These items are covered and they are entitled to pay them." (This went much further and directed the decision). He gave as his reasons for ordering this was so the matter would be brought to a head after all the delays and all the time Teron International had had to fix the deficiencies. In the Tribunal's view, this certainly justified the making of a decision without further delay, but not necessarily the making of this particular decision. The discrepancy between the evidence of Walker and Maling on the point of how far Maling's instructions went is also to be noted. What was in the letter tends to corroborate Maling rather than Walker but the letter and the Schedules are so confused with so many contradictions that one must wonder whether Walker understood what he was doing and how Maling, in the circumstances, could allow Walker to send out this material and consider that he was carrying out his duties.

Mr. Maling's evidence has to be suspect on another point. During cross-examination on the question of what could reasonably be taken to be included in complaint #41, he said that "Repair leaks in casement windows of tower units" referred to and included all of the windows in the whole of the two buildings. This is plainly not so, the only motivations we can see for his making such a statement are either that, when he made it, he was under the impression that the Program had to bring everything they did within this complaint made within the first year in order not to fail by reason of section 13(4) of the Act or that he did think he was correct. The former is a serious reflection on his credibility and the second on his judgment.

We have referred earlier to a number of circumstances in this case which appear peculiar or strange. Mr. Maling in his evidence, referred to another, being the fact that, for all the talk and pressure in April and May of 1988 to get something done, when the initiative was passed to the Condominium Corporation by the letter of June 3, 1988, in fact it did not get a proposal to get on with it from anyone until the letter from Otto & Bryden dated May 11, 1989 and did not have specifications for doing so until those prepared by Otto & Bryden in July 1989 - 15 months later.

It is obvious from examining all of the evidence that the

pressure to get the matter resolved was coming in the first instance from certain unit holders and officers and directors of the Condominium Corporation and that during this period their objections did not include keeping up the pressure either upon the Program or upon Teron International, and their pursuing the matter with Otto & Bryden which ultimately resulted in a letter and the specifications (tabs 14 and 15 of Exhibit 17). It was Mr. Maling's evidence as well that there were no letters complaining of water leaks which came to the Program in that year's period from anyone. Mr. Maling gave evidence that, up until the time they got the copy of Mr. Otto's letter of May 11, 1989 from the Condominium Corporation, he had expected to get a set of specifications based on the Morrison Hershfield Report as directed, but he also said that he was the person who authorized the proceeding with the proposal to replace all of the windows in accordance with the second option put forward by Otto & Bryden without any obtaining of another professional opinion or alternate estimate of costs or even following Mr. Otto's own suggestion as to correspondence with the Program mentioned in the last sentence of his letter. Later on Mr. Maling admitted that he did not know whether anyone ever made an inquiry as to what kind of window replacement they were getting. One has to wonder what they thought they were doing.

Mr. Maling referred to a letter written on November 29, 1989 from the Program over the signature of John Reid, its Manager for Eastern Ontario to the Condominium Corporation (tab 39 of Exhibit 16) which the writer said would serve as a decision letter under section 16 of the Act. Mr. Maling disagreed with this statement and said that it was not a decision letter within that section. The letter did, however, contain an unequivocal undertaking on the part of the Program to pay to the Condominium Corporation \$1,325,934.69. Mr. Maling did say that, in his mind, the conciliation process had failed. He did not turn his mind to the question of loose ends of the conciliation which should be tidied up.

At the time the \$1,301,154.61 was paid out by the Program to Messrs. Nelligan, Powell, Mr. Maling said he made no inquiries as to whether the work was complete or substantially complete and he said he did know what were the terms of the trust upon which the money was paid to the solicitors. All of this seems very strange as well.

On cross-examination, Mr. Maling confirmed that the Program retained Messrs. Suter, Keller for the purpose of monitoring the demolition of the existing window systems and the installation of their replacements to get professional confirmation of the Program's decision to go this route.

The next witness called was Mr. Herb Otto, the architect who was responsible for the original Technical Audit and the later recommendation to replace all the windows and for the specifications upon which the contract was let to Phillips. He said that the summary (which was the only notice of deficiencies sent on time by the Condominium Corporation) was prepared by his firm for members of the Board of Directors from the Technical Audit for easier reference. From his evidence, we get some explanation of what was taking place during the period from June 1988 to May 1989 when the Program had no evidence of activity in response to its letter of June 3, 1988. The Condominium Corporation had contacted Otto & Bryden, this firm was conducting inspections and doing water leak tests and compiling reports as to these and Schedules as to water damage reported by unit owners (see Exhibit 51). Mr. Otto said that they determined that the water penetration was extensive and the failure of hermetic seals was extensive. They found a major deficiency in the setting blocks used under the sheets of glass in the windows. These were of a wood product which soak up water and deteriorate and should have been of a rubber product which would not.

Mr. Otto also criticized the installation of the CW1 window system saying that they were not really curtainwalls and also did not provide a rain screen as required by the specifications. He said that they were inappropriate for this installation. At tab 4 of Exhibit 51 are included some of the specifications for the glazed aluminum curtainwall and one of these under Design is "4. Component parts to employ the rain screen principal and provide a completely impervious air and vapour barrier." Mr. Otto said that the CW2 system as installed did not provide a rain screen either as it did not contain weepholes to drain out water as such a system requires. He said the entire curtainwall was not fastened sufficiently at each floor and the whole weight of its height of six stories caused the settlement of its entire facade. It was his evidence that to replace the setting blocks one would have to take out the windows and put in the new blocks and put the windows back in and reseal them. He said that they calculated that it would cost as much to repair as to replace these systems. He said that the specifications for replacement were prepared under his auspices and that they were asked by the Condominium Corporation to prepare specifications which would cover the items in Schedule "A" to the Program's letter of June 3, 1988. He then said that the specifications they did prepare covered items not in Schedule "A". He gave no explanation for this except the decision to replace rather than retro-fit the windows which explanation fits some but not others of the additions. Another curious fact in a lengthy list of curious circumstances.

Mr. Otto emphasized certain observations he made which he said were deficiencies in the original construction. In addition to the inappropriate use of CW1 window systems, the absence of weepholes in the CW2 systems and the use of wooden or masonite setting blocks he said the metal spandrel panels on the face of the face of the buildings were held in place simply by caulking, the flashings were not properly completed, the support of the aluminum panels was not strong enough to support the load and much of the original caulking failed because it had not been properly installed.

On cross-examination, Mr. Otto said that he was satisfied with the Technical Audit report and that it properly covered what it was supposed to cover. In this context, he referred to the terms of reference listed at the beginning of the report (Exhibit 25). A perusal of this document shows that it was his responsibility in doing the audit to do sufficient inspections and investigations to discover deficiencies in existence at that time and it was Mr. Otto's evidence that this was done. When asked why there was no reference to the absence of weepholes in the CW2 window systems in the Technical Audit, he said, "The absence of weepholes is not necessarily a deficiency." In view of the importance he put upon this item in his earlier testimony at this hearing (and the evidence given by other witnesses on it to which we shall refer), this answer is a puzzling one.

In cross-examination, Mr. Otto also changed his position with regard to the original installation of CW1 windows saying he is not suggesting that the design itself of CW1 in the building was faulty and that if installed properly it could have been effective. He said that he had seen CW1 installations of this type which were effective. Mr. Otto admitted that Morrison Hershfield were experts in this field and said that when he read their report that he did not disagree with any of their findings or observations. However, he said he made the judgment that Morrison Hershfield's solution would cost as much or more than replacement of all of the windows. It is to be noted that he did this without giving any comparative figures in support of it and as far as the evidence discloses not obtaining any such.

On the question of the observations made by himself and his people and Mr. Keller and his people during the demolition of the original window installations, he said that by the time any of these were made, the contract had been signed with Phillips and its work was underway so it was too late to go back to the Morrison Hershfield recommendations no matter what the observations and findings were. Apparently no one thought to take a small part

apart before going this far to check out the question before getting committed to the replacement alternative.

The next witness for the Program was Mr. H. Keller, a Professional Engineer with the firm of Suter Keller who was retained by the Program as aforementioned. An original copy of his report with original colour photographs is Exhibit 59. The Executive Summary at the beginning of his report reads:

Early in 1990, Suter Keller Inc. was retained by the Ontario New Home Warranty Program (ONHWP) to review and monitor the replacement of the existing curtainwall system at the two 6-storey apartment buildings forming part of condominium CCC 256 also known as Canal 111.

The ONHWP had made funds available to replace the curtainwall system following investigations by several consultants into persistent water penetration problems. The consultants had concluded that design deficiencies were the primary cause of the problem and the architect retained by the Condominium Corporation concluded that the best solution would be to replace the existing curtainwall rather than retrofitting it. Suter Keller's mandate was to determine the validity of replacing the entire curtainwall or whether extensive remedial measures would have been more appropriate.

Detailed visual observations during the demolition work both on the exterior and interior revealed a number of key deficiencies which contributed to the water penetration problems. These deficiencies included:

- absence of proper flashing details at the interface with other building elements
- absence of an effective and continuous air barrier system
- absence of a pressure equalized and drained curtainwall system
- lack of proper support conditions at the bottom of the curtainwall which led to the rotation of the bottom sill and hence to the pooling of water along the sill
- absence of a proper structural support for the metal spandrel panels
- excessive reliance on a single-stage caulking system to seal the curtainwall.

During the demolition work it was further discovered that the field welds of the support brackets at floor levels were corroded and that the bent steel plate at the edge of the concrete floor was not adequately fastened to the structure.

The information gathered during the curtainwall replacement work indicated that very extensive remedial measures would be required to restore the existing curtainwall to a serviceable condition.

To maintain the curtainwall in a serviceable condition over the longterm, an extensive sealant replacement program would be required.

In view of the fact that the newly discovered structural concerns had to be addressed as part of the remedial measures, it is our opinion that the most cost effective and promising solution to the persistent water penetration problem was to replace the existing curtainwall in its entirety.

His summary and conclusions found at the end of this report read:

Observations made during the demolition of the existing curtainwall system have shown the presence of numerous deficiencies which can be attributed to design, workmanship and maintenance.

In order to alleviate the leakage problems and properly support the curtainwall system, the two options of retrofit or replacement appeared to be available. To retrofit the existing curtainwall system, the following key measures would have had to be implemented:

1. caulk and re-caulk all exterior and interior joints
2. install flashings at all vulnerable junctions between curtainwall and adjacent building elements
3. provide continuous air barrier at interface between curtainwall and adjacent building elements as well as at metal spandrel panels
4. provide adequate lateral and vertical support system
5. provide curtainwall drainage system
6. replace all wood setting blocks
7. repair vertical joints between curtainwall framing and brick veneer
8. repair all operating sashes.

In order to have implemented the above measures, the scope of work would have been very extensive and would have had to include the following activities:

1. removal of all glazing to replace wood setting blocks
2. reconstruction of all masonry spandrels and parapets at curtainwall locations to install flashings
3. temporary support of existing curtainwall to reconstruct base support
4. repair of deteriorated masonry adjacent to curtainwall
5. temporary removal of all heating units to seal air barrier. This would include framing joints, metal spandrel panels and drywall joints.
6. insulation and sealing of vertical joints between curtainwall and brick veneer
7. retrofitting of all operating sashes.

While these repair measures would have been very extensive and equally disruptive to the unit owners, they would not necessarily have ensured the satisfactory longterm performance of the existing curtainwall system.

Additionally, this retrofit approach would not have addressed the rectification of the inadequate structural support issues, such as loose support brackets, inadequate attachments and corroded field welds. This condition would have constituted a major safety problem. The reconstruction of a new stud wall at the bottom of the curtainwall would also have included the risk of further disturbing the existing installation. Furthermore, the retrofitted system would have required extensive ongoing maintenance of the many face sealed joints to ensure weathertightness.

Therefore, under the given set of circumstances, we concur with Otto + Bryden's recommendation that the best and likely most cost effective option was to replace the existing curtainwall in its entirety.

On cross-examination, Mr. Keller said that when he was called in, he understood the decision had been made and he was asked to determine whether it was the right decision. He put it, "I understood they had decided to replace and needed me for back-up." He also admitted that his experience was mostly with masonry and that he was not an expert on curtainwalls. He also said that in coming to his conclusion as to the cost effectiveness of replacement, he did not do any type of cost analysis and so his opinion on that point was "Just a general view" and he did not compare the cost of replacement with the cost of implementing the Morrison Hershfield recommendations for retro-fitting.

He admitted that a CW1 installation is intended to rely on caulking and if this is done properly, it should work and also that he did not envisage the replacement of all of the thermal units (the double sealed window glazing). He also said the only reason they had to take out all of the windows was to replace the setting blocks. This becomes a very important piece of evidence in view of the evidence which we heard later on to the effect that it was not necessary to take out the windows for this purpose.

The next witness for the Program was Mr. Don Moreau who has been with the Program since September 1986 and was employed in its Ottawa office in August 1989 when he took over the file from Mr. Walker. He began by dealing with the complaints received by the Program from unit owners. These were contained in a brief of documents prepared by the solicitors and which is Exhibit 60 herein. He said that when owners made complaints of deficiencies in the common elements, the Program would tell them to refer these to the Condominium Corporation. The evidence of these complaints contained in Exhibit 60 is relevant to two issues. The first is the issue of complaints as to deficiencies in common elements received in writing by the Program within the one year time limited by section 13(4) of the Act. The second is the contribution which they make to the ongoing history of water leaks through the windows of the building.

On the first issue, we have complaints of water leaking through windows given to the Program within the one year limited by Mr. Eyre, the owner of unit 506 and by Mrs. Hartman, the owner of unit 504. At tab 1D of Exhibit 60 is a document entitled "Certificate of Completion of 30 day HUDAC inspection" concerning suite 506, dated March 15, 1985 containing 24 items of complaint, the sixth of which reads:

6. The kitchen and living room windows still leak.

This document was sent to the Program by Mr. Eyre by a letter of July 9, 1985 (see tab 1A of Exhibit 60). On July 5, 1985, solicitors for Mrs. Hartman wrote the Program with a list of complaints, one of which was "There is a leak at kitchen window glass - 2 panes on the right side." Both of these notices of complaint by unit holders came to the Program within the one year time limited for the making of complaints in the common elements.

The other evidence of complaints in Exhibit 60 which form part of the history aforementioned are included, together with all other available evidence of complaints of window leaks on a drawing or a plan which is Exhibit 90 and reference will be made to this later.

It was Mr. Moreau's evidence that the Program released the \$1,301,154.61 to the solicitors for the Condominium Corporation in trust to pay out as progress was made with the work, but he said the Program never asked anyone to provide it with any documentation as to how this was carried out.

On cross-examination, Mr. Moreau referred to reviewing the "conciliation decision letter" when he took over the file. This probably has to refer to the letter of June 3, 1988. Some people in the Program apparently consider this to be such a decision letter, Mr. Moreau being one of these, therefore understanding that there was in fact a conciliation. The Tribunal has some real concern with the implication of one other piece of evidence when considered with this one. If Mr. Moreau reviewed the letter, as he said he did (and it is hard to believe that he would not have considered such an important letter, whether he considered it a decision letter or not), he would have seen the clear and unequivocal commitment on the part of the Program "with respect to water penetration at 111 Echo Drive all reasonable costs will be paid". Then what was in his mind when, at a later date he told Mr. Chris Teron that the matter was still open for discussion between them. Mr. Moreau admitted to telling Mr. Teron this.

Mr. Moreau was the one on behalf of the Program who wrote the Condominium Corporation on August 10, 1989 (tab 34 of Exhibit 16) stating that the Program found the new specifications for total replacement in order and saying they should be sent out for tenders. On November 1, 1989, the Program got copies of the tenders from the Condominium Corporation. Mr. Moreau said that he was the one who retained Mr. Keller and that, at the time he did so he did not know the latter had never seen that type of curtainwall and was a masonry expert. He could not say whether, if he had known that it would have made any difference to what he did.

On the question of whether the \$1,325,934.69 which the Program committed to pay to the Condominium Corporation in the letter of November 29, 1989 (tab 39 of Exhibit 16) was greater than the total of the warranty obligations under the regulations in force at that time, Mr. Moreau said he never considered this question.

While he was the second witness called on behalf of the Program, who had been present at the meeting in Toronto with Mr. Rose and others and Messrs. William and Chris Teron to which we have referred above, he gave no evidence whatever to take issue with what the Terons said took place at the meeting. In answer to

a question from the Tribunal at the end of his evidence, he said that Mr. Chris Teron said at the meeting that only minor repairs remained to be done to remedy what was left, that the Terons were upset because of the overall dealing by the Program and that the meeting broke up with the parties not on good terms.

The next witness on behalf of the Program was Mr. Arnold Eyre to whom reference has already been made, the owner of unit 506. He was on the Board of Directors of the Condominium Corporation during the relevant period. Mr. Eyre said that because he was the only engineer on the Board he was asked to take charge of the matters which he did. His principal concerns were that Teron International did not get on fast enough with remedying deficiencies when reported and did not provide effective remedies for water leaks through these windows for whatever specific causes, so that they continued long after he and other residents believed they should have been fixed. At first he pressed Teron International for action and when the leaks continued, he said the Board of Directors wanted the Program to take charge of the problem (see letter of November 9, 1987 at tab 1 of Exhibit 23).

On February 22, 1988, Mr. Eyre wrote to the Program (tab 9 of Exhibit 23) and to Teron International (tab 10 of Exhibit 23). On November 9, 1987, he said, "Will ONHWP intervene now, please, and put an end to this endless hassling and get our deficiencies rectified?" On February 22, 1988 he wrote to the Program, "The repair work is not progressing on any satisfactory schedule. We do not believe that a satisfactory effort let alone 'every effort' is being made to rectify the outstanding deficiencies. We do wish to proceed with an alternative course of action."

In another letter of July 6, 1988, Mr. Eyre referring to a rainfall on June 25, 1988, says that they made a survey of damage and took photographs. Several of these photographs were filed as Exhibit 61. There are some notes on the back with some identification of their subject matter. These pictures show significant water leaks in the areas indicated on that date. It was his evidence that "by and large" the water problems have been resolved by the replacement of the windows.

On cross-examination, Mr. Eyre was asked about the Morrison Hershfield Report. His answer was that he recalled hearing about it at a Board meeting and felt this was good news that Teron International then had such a report, but he did not recall any discussion of its recommendations. This seems peculiar. The direction of the Program in its letter of June 3, 1988 to get specifications based on the Morrison Hershfield recommendations, the drastic step (to use Mr. Otto's language) of replacing these

recommendations with a plan to replace every window in both buildings, and the responsibility which the Directors took with this decision makes it somewhat difficult to believe either that there was no discussion of those recommendations or that Mr. Eyre had forgotten about it.

Another peculiar piece of evidence given by Mr. Eyre was that while Mr. William Teron who he knew was a senior officer at Teron International lived next door to him in the building and while he therefore saw him from time to time, he never voiced any of these complaints to him.

The next witness on behalf of the Program was Mr. Mackie, a graduate architect who had been with Otto & Bryden for six years. He said that he had designed and was familiar with curtainwall systems. He produced a document entitled "Carleton Condominium Corporation #256 Reports on Condition of Units" which is Exhibit 63 and contains 32 tabs for 32 units. These reports were all based on inspections and investigations made on June 4, 5, and 6, 1990. He said that he prepared from these the Summary Chart found at tab 2 of Exhibit 51. It sets out information as to damage prior to November 9, 1990 in accordance with a legend. None of these documents identify the dates when these items of damage occurred. A copy of this chart is as follows:

CANAL 111
PRIOR DAMAGE SUMMARY SCHEDULE
November 9, 1990

UNIT NO.	FRONT ELEVATION			REAR ELEVATION		kitchen	bath
	centre	north	south	north	south		
101	3	1	2	3	3	3	
201	2	1	1	2	2	3	
301	0	0	0	2	1	1	
401	1	1	1	1	1	3	
501	2	1	2	3	3	2	
601	2	1	1	3	1	1	
102	3	3	3				
202	2	3	2				
302	3	2	3				
402	2	1	1				
502	1	3	3				
602		2	2				
103	2	3	1	3	1	1	3
203	1	1	1	2	2	2	1
303	2	1	0	2	1	1	1
403	1	1	1	1	3	3	1
503	3	1	1	3	3	1	2
603	2	3		2	3	1	3
104	3	2	2	2	2	2	2
204	1	0	2	2	2	2	2
304	1	0	1	1	1	1	1
404	2	1	2	2	2	2	2
504	3	1	1	2	2	1	1
604	2	1	1	1	2	2	1
105	1	1	2				
205	1	2	2				
305	1	2	1				
405	3	1	2				
505							
106	3	1	1	2	3	3	1
206	2	1	0	2	2	2	2
306	2	1	0	2	2	1	1
406	2	1	1	1	3	1	2
506	2	2	0	1	1	1	1
606	2	2	1	1	2	1	2

LEGEND:

0=no damage

1=some damage

2=significant damage

3=extensive damage

Mr. Mackie also produced a document entitled "Brick Investigation and Report" dated October 25, 1990, a copy of which with its original photographs is Exhibit 64. The opening of this Report under the heading of Background reads as follows:

Buildings A & B, the apartment form structures of Canal 111, have been undergoing a replacement program for the curtain wall glazing system. This is being done under contract between the Condominium Board of Directors and H.K. Phillips Construction. During the construction, the existing curtain wall systems were removed and in doing so exposed certain conditions in the masonry wall systems which were both not in conformance with the Code nor in conformance with the original drawings supplied to us of the original building construction.

As a result of the concerns raised by these observations, we were authorized to proceed with an investigation of the brick wall system to determine what problems existed and what remedy, if any, would be necessary to rectify these problems.

As the work progressed, certain structural deficiencies were encountered which could only be rectified at the time that the glazing was about to be installed. Due to the urgency required by the ongoing construction, decisions were taken as required with the knowledge of the Board to take immediate corrective action and authorize the contractor to make the repairs.

When the problems first came to light, we requested that the Ontario New Home Warranty Program represented by John Reid and Dan Morrow attend the site and view these conditions along with members of the Board. Subsequent to this meeting, we kept Heinz Keller from Sutter Keller & Associates informed of each instance of a defect as requested by the Ontario Home Warranty Program to document each condition in parallel with the investigation by ourselves and our engineers, Oliver Mangione & McCalla & Associates. In addition to this report, therefore, the Ontario New Home Warranty Program also will have assembled documentation through their own consultant with regards to all of these items.

For all items related to the brick wall system defects which the contractor has been asked to repair, we have kept detailed records of the costs for this work. These costs reflect only the work related to the brick wall systems and structural components which were essential to be dealt with during this construction stage. Otherwise the curtain wall installation could not have proceeded without danger of structural failure or an expensive duplication of repair at a later date. It is anticipated that these costs will be recovered along with any additional ones resulting out of the Ontario New Home Warranty's approval of the condominium's claim for these defects.

It should also be noted that the defects found have a direct bearing on problematic symptoms found in the original technical audit submitted by the Board to the Ontario New Home Warranty Program. Specifically, these relate to the complaint with regards to excessive efflorescence on the brick work of the building, to the cracks in the brick work caused by load transfer of the inadequate shelf angles, the missing or poorly installed flashings above the top of the curtain wall windows which Teron reportedly repaired, the reverse slope of flashings at the base of the windows and the likely deterioration of the brick ramp wall due to omission of flashing.

The Summary and Recommendation of this Report found at page 12 reads:

The defects found and as reported are extremely severe in nature. A very cautious approach was utilized to ensure that these problems could be accurately documented and verified. Some five additional openings were made in the brick as well as edge conditions viewed when the curtain wall was removed to determine the extent of the deficiencies. This investigation has left us only one conclusion which is to remove the brick entirely, repair the structural deficiencies in the form of wall ties and shelf angles, reinstate correct flashings and rainscreen principles and reclad the building with brick as it was designed.

Because of the statement that the defects described in this Report have a direct bearing on problematic symptoms found in the original Technical Audit, this is evidence which must be taken into account in determining the issue here.

On cross-examination, Mr. Mackie said he first was involved with this project in January 1990. With regard to the last sentence on page 2 of Exhibit 64, "It is anticipated that these costs will be recovered along with any additional ones resulting out of the Ontario New Home Warranty's approval of the condominium's claims for these defects", it was his evidence that these were not specifications prepared dealing with these masonry problems, and that "this was an addition by the Program". No one else referred in any way to this problem. It is clear that Mr. Otto relied upon the work of Mr. Mackie in coming to his conclusions and one has to wonder to what extent these were not dealing with the same considerations. This question is raised further by Mr. Mackie's statement that he was not familiar with the Morrison Hershfield Report.

The next witness for the Program was Shelly Lanthier who was an employee of Wilson Management and Company, the Property Manager of the Condominium Corporation and who looked after the buildings from when they took over in 1985 from Teron International which was the manager up to that time until she left in October 1987.

Ms. Lanthier referred to the Condominium Declaration, a copy of which is Exhibit 65. On the back of the Declaration itself is a Registry Office stamp showing that it was registered in the Land Titles office in Ottawa on October 17, 1984 which established the date from which the warranties under the Act and the time for making claims for deficiencies began to run.

Ms. Lanthier spoke highly of the building, saying she thought it a gorgeous place. She said she made a note of all deficiencies reported in the common elements and brought them to the attention of the Program and continued to do this after the one year period under section 13(4) of the Act had expired. She also said that she communicated all of the complaints which she got to the builder Teron International. She filed copies of Minutes of several Board meetings (being Exhibits 66-79 from October 7, 1985 to May 27, 1987). These contained references to items of complaint set out in the Technical Audit and otherwise, and she said that there was no item which Teron International refused to do. She said she always tried to maintain a good relationship with the builder and the owners.

These Minutes and Management Reports to the Board of Directors on each occasion follow a history of the dealings with these deficiencies as we have outlined it herein. From the evidence in these exhibits, we would note particularly the following. In the Management Report to the meeting on February 17, 1986, there is a reference in item 26 "Teron re Building Deficiencies (mainly water infiltration)". Ms. Lanthier said that this was an urgent situation which she referred to Teron International as action was required immediately. In the Management Report to the meeting of June 9, 1986, there is reference to correspondence with the Program and with Teron International seeking to establish completion dates. She said because they had not got satisfaction from Teron International, she wrote on May 20, 1986 to the Program seeking its intervention (see letter at tab 4 of Exhibit 16).

Ms. Lanthier referred to a letter written by Dr. Villeneuve, then Chairman of the Board, on December 15, 1986 to the Program (tab 11 of Exhibit 16) which advises that serious leaks remain, some old leaks are reappearing and some are getting worse. She said that the Board was getting as frustrated as were the management. Dr. Villeneuve in the letter asked for a deadline from Teron International to complete the remedial work and for the Program to have it done and suggested June 1, 1987.

Ms. Lanthier was present at a meeting at the site on August 26, 1987 which included Mr. Eyre, Dr. Villeneuve, Mr. Otto, Mr. Chris Teron and three representatives of the Program including Mr. Walker. She said the meeting got "hot and heavy" with Mr. Eyre wanting the problems resolved "now". This meeting is summarized by Mr. Walker in a letter of August 28, 1987 found at tab 22 of Exhibit 16. Details found on the second page as to items completed and items still outstanding are quite important.

On cross-examination, Ms. Lanthier referred to the Minutes of certain meetings of the Directors of the Condominium Corporation and established that at a meeting on October 22, 1985 (Exhibit 67), the only reference to water leaks is to leaking into the lobby areas from the main windows above them; that at a meeting of October 22, 1985 (Exhibit 68), there is no reference to water leaks; that at a meeting on December 16, 1985 (Exhibit 69) there is a reference in item 22 to a letter to Teron referring to seven problems, one of them being water infiltration over the front door of the north tower; at a meeting on February 17, 1986 (Exhibit 70) in item 26, there is a reference to a letter to Teron about building deficiencies said to be mainly water infiltration; at a meeting on March 26, 1986 (Exhibit 71), there is no reference to water leaks; at a meeting on April 22, 1986 (Exhibit 72), there is

a reference to a letter to Teron without a reference to water leaks; at a meeting on May 15, 1986 (Exhibit 73) in item 1, there is a reference to a telegram to Teron International re failure to repair leaks in tower "B" lobby ceiling but no other reference to leaks; at a meeting on June 9, 1986 (Exhibit 74), there is reference in items 5 and 14 to correspondence sent to Teron with a Revised Deficiency List and a request for completion dates; at a meeting on August 18, 1986 (Exhibit 75) a reference in item 16 to the Board of Directors now asking for full involvement of the Program, in item 22 to the fact that windows in unit 502 leaked badly during a storm on July 26 which windows had been repaired before; at a meeting on October 1, 1986 (Exhibit 76) under item 15, there is a reference to the repair work undertaken by Teron International in the following terms:

15. Brickwork - Proceeding under Teron International by Spirito & Sons. Apparently Tower B has been completed - no leaks have been reported recently except for the window units (which have not been repaired yet).
- Leaking continues at Tower A and Teron has been made aware of the continued problems (with copies to the ONHWP)

Attached to these Minutes is a copy of a letter which is also found at tab 8 of Exhibit 16 written by Mr. Maling for the Program to Ms. Lanthier for the Condominium Corporation referring to a meeting and inspection on August 28, 1986 which deals with the problem:

- 9) BUILDING LEAKS: (general) Mr. Teron reported that a masonry repair trade was on site August 28 and would be performing repair work to correct the masonry related leaks. It was agreed that once this work is completed, the condominium will provide Mr. Teron with a list of unit damages for his attention. It was further agreed that the problem of building leaks will be monitored following these repairs and any further problems will be investigated and dealt with by Teron International.

At a meeting April 2, 1987 (Exhibit 77) in item 5, it is stated that leaks continue and were bad over a two-day mild spell (which would indicate ice and snow melting rather than rain driving against windows), the only specific reference to areas being the

garage and town house roofs which would collect ice and snow as the curtainwall would not; at a meeting April 30, 1987 (Exhibit 78), there is no reference to water leaks; and at a meeting May 27, 1987 (Exhibit 79), there is a reference to a meeting set up by Mr. Walker for May 25 to discuss outstanding deficiencies.

The picture which emerges from these records made at the time as the matter progressed is that there were serious deficiencies causing water leaks, that Teron International was dealing with them as they were reported, that much of the remedial work was successful but some of it was not, that Teron International did not get on as quickly as it should have done with the remedial work, that some of the unit owners and Board members were getting frustrated and upset but that the situation was not one which should be found to be out of hand and requiring Teron International to be put out of the picture and someone else brought in. Ms. Lanthier agreed, as did Mr. Walker, that up to August 1987, Teron International was attempting to honour its warranty obligations in a responsible manner.

The next and last witness for the Program was Mr. Robert Ladouceur, the principal in the Company employed by Phillips as a sub-contractor to remove all of the original windows and install the new ones. He said that he had been in this business for 27 years and was familiar with curtainwall systems. He said his contract for the replacement of the curtainwall and all of the windows in the building was approximately \$900,000.00. He personally supervised the removal and replacement of all of these window systems. He made a number of observations and gave a number of opinions which we wish to note. Some of these were:

- he called the window system on the north wall of each building a "makeshift system which they tried to make into a curtainwall system";
- the system should not have been used on a six storey building;
- the CW1 system cannot be used as a curtainwall;
- there were no expansion joints for vertical expansion and there should have been 2 or 3. He said that this led to breakage of seals and water penetration;
- he had never seen an attempt to drill weepholes in such a system;
- the horizontal mullions were run all the way across,

breaking the vertical mullions when it should have been the other way around to allow proper drainage all the way down;

- there were no required corner blocks to isolate each piece of glass in its opening;
- there was no proper inside sealing of windows because of the absence of corner blocks;
- whoever put in this system did not understand how it was supposed to work;
- to drill weepholes one would have to pry off the pressure plates which would destroy them and one would have to buy new ones;
- the inside sheets in the windows were not sealed and, therefore, there was no vapour barrier;
- the system did not have floor anchors;
- the wood type setting blocks were no good and had to be replaced with rubber type blocks;

Mr. Ladouceur referred to the Morrison Hershfield Report and its recommendation and said that, in his opinion, those recommendations would not have solved the problems. He said that there still would have been no vapour barrier and no expansion joints and new caulking put on would crack the same as the old did. He said that, to do the work suggested by Morrison Hershfield one would have to remove and replace all of the glass and to do this one would have to remove the snap caps and the pressure plates. These latter would be damaged in doing so and as for the glass, all old caulking and tape would have to be removed causing some damage and the cost would be prohibitive and no guarantee that it would work. Altogether, he said it was much better and cheaper to replace the whole system. He said he would not have guaranteed the work recommended by Morrison Hershfield.

On cross-examination, Mr. Ladouceur retreated from some of the positions he had taken. He said that the CW1 installation would have been appropriate if fastened between floor slabs but not as a curtainwall, and that the face seal system could work on this installation if properly installed. He also agreed that one could have expansion joints in a system supported at each floor. He said that while the anchoring was inadequate, the system as installed could have been anchored properly. He said that he would expect

some of the thermal units would break in any installation.

The first witness for the Respondent Urbanetics Limited was Mr. Chris Teron. He is 34 years of age and a graduate of Carleton University with a degree in Architecture. He is a Vice-President and Secretary-Treasurer of the Respondent Urbanetics Limited and at all material times was an officer and director of Teron International Urban Development Corporation Ltd. He said his father started in 1955 and since that time, these companies and their predecessors have built approximately 5,300 housing units in Canada and over 1,300 in Florida. Exhibit 85 is a chart showing these. Apart from the buildings with which we are concerned here, they have never had any serious problems.

Mr. Teron explained how the design of the window systems came into being. The objective was to create what was quite an impressive effect (Ms. Lanthier had described a gorgeous building - in Exhibit 87 we have a letter from a technical representative in the condominium section of the Program who visited the site on September 21, 1983 during construction and said he was most impressed by the quality of the work in progress and adds, "The design is also quite different and I shall watch the progress with interest.") To establish what he described as a filigree effect, they had to use smaller panes for some windows and he had to be concerned with the sizes of the mullions and the panes both from the inside and the outside. Originally the plans were for aluminum clad wood frames and these were changed to all aluminium windows. For this filigree effect, they had to use a CW1 system. But they could not use a CW1 systems for windows in two parts of the curtainwall - the sloped glass at the top floor because it is not practical to put sloped glass in from the inside and in the units which had two storey living rooms and the glass had to span two floors and the stress was such as to require CW2. Mr. Teron referred to Exhibit 47 which contains a good photograph of the whole window system on the north elevation and some plans and drawings with a colour code system which gives a picture of all of the windows in detail.

Dealing with the question of problems with these units, as distinct from the common elements and claims by the unit owners, Mr. Teron said that while there were a good number of these, Teron International remedied them all to the satisfaction of the owners and he did not think any of these ever went to conciliation.

Mr. Teron said that at the beginning insofar as window leaks were concerned, they were dealing with the casement windows and water apparently coming in through the window systems up near the top. The problems with the casement windows was that the

original hinges were not heavy enough and when the windows were opened out the weight bent them down so that they could not be closed properly and would leak. The remedy was to supply stronger hinges which Teron International did and corrected this problem. As to the other problem in the Fall of 1985 Teron International was dealing with the supplier, Air Lock Windows trying to stop the leaking and in 1986, they concluded that the problems at the top were not with the windows. Then they engaged Trow Inc., a firm of engineers, to investigate and advise with regard to the problem and this Company submitted a written report on May 8, 1986 as found at tab 11 of Exhibit 17. It identified the problem as being with the masonry spandrels at the top of the building. Teron International had a contractor come in and replace these properly and this corrected the vast number of the leaks.

An important piece of evidence given by Mr. Teron, to which no contradiction was offered by the Program was that in at least two units, the curtainwall windows as originally installed were not replaced (Mieran's unit at the top of tower B and the unit occupied by Mr. William Teron) and there have not been any problems with these windows leaking at all.

In discussing the Technical Audit, Mr. Teron referred to item 41 in the Summary "Repair leaks in casement windows in tower units" and to the only reference in the Technical Audit itself (Exhibit 25) on page 20 thereof to "Windows and Glazing":

With the exceptions noted below the windows and exterior glazing appear to be sound. The problems that we have inspected concern the infiltration of water at the sloped glazing of the greenhouse units on the 6th floor. It is as yet unclear to us whether the water is entering the window frame members or through the flashing surrounding the window units themselves. It appears more likely from the evidence of the entry point of the water that the leak is occurring at the flashing. A hose test of these units as mentioned earlier would be the best procedure as an initial step to try to determine where the leak is actually occurring.

The second problem concerns the large casement windows in the curtain wall of the apartment buildings. These appear to have been added into the main frame and specially adapted for this installation. The actual installation is not completely successful since those casement windows inspected show severe stress on the hinges, the flush bolts holding the second panel in place and on the latching device. In some instances these have been broken. The operating hardware on these casements should be reviewed and improved upon in order to correct present deficiencies and to prevent future ones from occurring. The casements themselves also appear to be leaking and this is caused we believe by the absence of a proper cap or flashing over the head of the casement unit. The water running down the curtain wall can easily enter the casement frame and run down the jambs to come out in the form of water leakage at the sill at the base of the casement unit. Water leakage is evident there and more than likely occurs as described.

Improvements to the hardware should improve the overall performance of the windows including gaps which presently exist which allow for excessive air infiltration. There are places where daylight can be seen through the joints in the window. The casement windows investigated were not equipped with screens. Screens are specified and should be provided. Because the casement units appear to have been adapted especially to the curtain wall, there may be some difficulty in providing sufficient reveal in the frame to install the screen.

Mr. Teron reviewed in detail the Program's letter of September 11, 1986 to the Condominium Corporation found at tab 8 of Exhibit 16 written following a meeting on the premises of Mr. Eyre, Mrs. Mierans and Shelly Lanthier for the Condominium Corporation, Mr. Maling for the Program and himself. The second paragraph of the letter reads:

Having reviewed the Otto & Bryden list dated May 7, 1986, it was agreed that many items were completed, in the process of being repaired or, otherwise resolved. I will therefore deal only with outstanding or unresolved matters in this report.

This letter goes on to deal with 10 listed outstanding or unresolved matters at that time. In its item #4 thereof dealing with windows, the Program agreed that Teron International had completed the major repair requirement to the masonry and flashings and in item #9 concerning Building Leaks, it is basically agreeing to the same thing. Mr. Teron said that 80 - 90% of the leaking disappeared when this work was done.

Mr. Teron said that the first report in 1987 which they got indicating that something was still wrong was a copy of the letter of February 5, 1987, found at tab 13 of Exhibit 16 from the Condominium Corporation to the Program reporting leaking into 5 individual units and lobbies of both towers, as well as some townhouses and a rear stairwell. This led to the Program's requiring Teron International to get another "professional expert to identify the causes and recommend remedial work" (see tab 14 of Exhibit 16) and in turn to the retaining of Morrison Hershfield and eventually to its report.

By this time, Mr. Teron said that there was a factor causing extra difficulty, namely the furnishing of misleading information by some persons, and particularly Mr. Eyre, on behalf of the Condominium Corporation, and more specifically in lists of complaints forwarded from time to time statements that items were not corrected which in fact had been corrected. A perusal of the ongoing lists of complaints shows that there was some validity to this point. In one example found in a letter from Mr. Eyre on November 9, 1987, found at tab 1 of Exhibit 23, there is a lengthy list of deficiencies alleged not be remedied which Mr. Teron said Mr. Walker agreed with him were done and should be off the list.

In November of 1987, Teron International began the work of implementing the recommendations in the Morrison Hershfield Report and finished tower A in December. They did not proceed with Tower B then as he said it was better not to do this work during the winter and they planned to do it in the Spring.

In a letter, mistakenly dated December 7, 1987, which should have been February 16, 1988 (Exhibit 20), Mr. Teron said, "The most serious leaks were in suite 502 and the resident informed us that the leaks have stopped." In his oral evidence, he said that as soon as the weepholes were installed, these windows stopped leaking. He said that Teron International never got any complaints from anyone after they completed the work carrying out the Morrison Hershfield recommendations.

Mr. Teron said that until April 1988, there was a very good relationship between himself and Mr. Walker. The first sign

of something different came in a letter of April 28, 1988 found at tab 20 of Exhibit 23 in which Mr. Walker demanded a detailed report as to the work carrying out the Morrison Hershfield recommendations and said that if the Program did not have a reply in 14 days, it would get another contractor to do it and Teron International would be liable to pay. This was followed by the letter of June 3, 1988 found at tab 29 of Exhibit 16 to which we have referred several times. Mr. Teron said that this letter came as a complete shock. Even then, however, Mr. Teron believed that the Program was still only trying to get the Morrison Hershfield recommendation carried out and he said that Teron International was always ready to do this.

Mr. Teron had prepared and filed as Exhibit 90 a chart of all the windows on the north elevation with a colour code system showing all of those which were ever reported leaking and the dates thereof. The last date that any leaks were reported was March 21, 1988 and all of these were in Tower A. The last date leaks were reported in Tower B was February 5, 1987. Mr. Teron said that from August 1988 to August 1989, no advice came to Teron International that any windows were leaking.

On August 7, 1989, Mr. Walker wrote to Teron International (tab 33 of Exhibit 17) a letter which is strange in several respects. It encloses specifications for remedial work, refers to investigation of two causes of noise intrusion of which no report had been made previously, advises that it is the intention of the Program to have the Condominium Corporation Board of Directors carry out a cost analysis of these specifications and then make a cash settlement to the Condominium Corporation, and then adds a paragraph in a completely different context asking Mr. Teron to contact the writer if he wishes more information and says, "If you would be so kind as to contact me and arrange a meeting, I will be only too happy to bring you up to date with regard to the situation at 111 Echo Drive in Ottawa". This letter certainly gives the appearance of being written by someone who did not understand everything that was going on. The first three paragraphs appear to have been dictated to him, or at least the substance of them, and the fourth paragraph appears to have been something which he added on his own account. This view is reinforced by the evidence that when Mr. Teron telephoned Mr. Walker on receipt of the letter, the latter said that he should not interpret the letter as a *fait accompli*, and that he should follow-up with Mr. Moreau who had taken over from him, Mr. Walker, in Ottawa and that he, Mr. Walker, would be glad to attend a meeting in Ottawa if desired. However, when Mr. Teron did call Mr. Moreau, the latter told him he had no intention of discussing the matter with him. However, the strange treatment of the whole matter at

this point was not all on one side. Mr. Teron did not respond in any detail (he said he called Mr. Walker on the telephone when he got the letter but apparently did not go into detail then) until October 31, 1989. One would have thought the seriousness of the situation would have prompted faster action, even if he were going away on vacation.

However, he did respond at length on October 31 (see Exhibit 26) with a 3-page letter and a 3-page list of comments on the nine items set out in the Tender for Repairs enclosed by the Program. This response can be summarized by saying that it deals in detail with each point in a manner which is much more consistent with the evidence of the development of each part previously before the change of approach by the Program than are the actions of the Program after that change of approach.

Mr. Teron said that at this point Teron International was most concerned to have its side of the dispute properly considered by the Program before an irrevocable decision was made to proceed on the new Otto & Bryden specifications and he wrote to Mr. Rose, the President/Registrar and a meeting was arranged, but it did not take place until later. He said Mr. Walker assured him that no final commitment would be given to the Condominium Corporation until this meeting did take place, but the evidence discloses that in fact, such a commitment was in place by that time.

On cross-examination, Mr. Teron was referred to Exhibit 60, the brief of unit owners' complaints. There are quite a number of complaints dealing with window leaks and Mr. Teron agreed that most of them did exist. He said that while masonry repairs corrected the vast majority of these leaks, they did not correct them all. Mr. Teron said that the leaking at the top of the curtainwall was the fault of the flashing and not of the sloped glazing and that this was remedied. He pointed out that in its investigations, Trow Inc. had not identified any air penetration but Morrison Hershfield did which led to its better identification of some of the problems.

He pointed out that Teron International had had all of the casement windows properly repaired and then these were totally replaced in the new installation. He said that after they finished all of the Morrison Hershfield recommended work in June 1988, they got no more complaints as to leaks. In fact, as noted above, this is corroborated by the documentary evidence.

Mr. Teron said that Teron International never refused to meet all of its obligations under the warranty provisions. He referred particularly to the letter from the Program dated February

12, 1987 (tab 14 of Exhibit 16) in which the Program demanded he get another expert opinion by May 1 or the Program would consider Teron International in breach and proceed on its own. Mr. Teron said he agreed with this and proceeded to engage Morrison Hershfield for this purpose.

Of importance to the issue of notice and whether there was a sufficiently broad or extensive claim made on time, was an admission by Mr. Teron that the reference under item 41 in a letter of July 2, 1987, from him to Mr. Walker: "It (the engineer's report) will address all forms of leaks in the front face of the buildings" was not restricted to casement windows. He also agreed that in the early part of the project, there were a few leaks in kitchen windows (on the side of the buildings), but said these were repaired and did not re-occur.

Mr. Teron said it was Morrison Hershfield's advice that they complete the first phase of the work being principally the weepholes and see what happened before going further. Mr. Teron agreed that they did not replace the setting blocks as recommended by Morrison Hershfield. He was referred to the reference in the Morrison Hershfield Report at the top of page 6 (tab 12, Exhibit 17):

The following are general observations and apply to both curtainwall systems:

- 1) We were surprised to find masonite (wood) setting blocks supporting the glazing panels. The setting blocks in the second curtainwall system were saturated due to the prolonged and repeated exposure to the trapped water (Photo 3). The masonite (wood) setting blocks in CW1 also soaked up water during the water penetration test (Photo 4).

Mr. Teron said that he accepted these observations.

Coming to the evidence of Mr. Ladouceur, Mr. Teron disagreed with it in a number of respects. Mr. Ladouceur had said the new panels had to be installed from the inside and he said that they installed them from the outside. Mr. Ladouceur said there were no expansion joints and he said there were expansion joints, but one could not see them as, by their nature, they had to be hidden from view. He disagreed with Mr. Ladouceur when he said one would have to remove the windows to replace the setting blocks. He disagreed completely with Ladouceur when he said one could not remove and later re-install the snap caps and the pressure plates

and he said that they did, in fact, reinstall many of these and damaged only a few which had to be replaced. He said that this is done all the time.

Mr. Teron agreed with Mr. Ladouceur's evidence that the sills at the bottom of the curtainwalls were sloped in, but said it hard to believe that the mullions further up were sloped. He said that if the curtainwall had deteriorated to that extent, there would have been a good deal more damage. Mr. Teron agreed that the Program had given Teron International every opportunity to remedy the problems up to September 1988 and never interfered with what it was doing. Mr. Teron also stressed that, up to the time he was instructed to take a different position, Mr. Walker was satisfied with the work and efforts of Teron International.

On cross-examination, Mr. Teron was referred again to the letter of August 7, 1989 (tab 33 of Exhibit 16) and he added the comment that his attention was caught by the fact that the specifications enclosed bore no relation to what was said before or what was in the Morrison Hershfield Report. At this time, he gave some explanation for the delay in responding saying that they did not respond casually or quickly because they wanted to research the matter to make sure that what they said was right.

The next witness for the Applicant was Mr. Mark Brook, a Professional Engineer. From his Curriculum Vitae (Exhibit 105), his evidence of his experience, his manner of giving evidence and the way he dealt with the points under discussion, the Tribunal was impressed with this witness and thought him quite qualified and competent. He has made a specialty of glazing systems and has acted as a senior consultant all over the country. Mr. Brook was retained by Teron International in 1990-1991. He inspected the buildings, read the Technical Audit, and all of the professional reports and looked at the architectural drawings, the shop drawings and the specifications. He also discussed the whole matter with the engineers in Morrison Hershfield who had done its work and he said he believed he could give a professional opinion as to the cause of water penetration into these buildings and the steps which should have been taken to remedy the same.

He began by referring to the Technical Audit where he said, apart from the reference to the casement windows, there is nothing to suggest a failure of the window systems. He said if water got inside at a leaking casement window, it would manifest itself right inside and would indicate where the leak was, although, of course, it might run down from there.

Mr. Brook referred to Mr. Ladouceur's evidence that CW1

installations should only be used in strip windows or punched windows in a horizontal row and said that he had seen CW1 systems used in many multi storey buildings. He said that a CW1 system is particularly subject to workmanship. Some leaking would not indicate a deficiency in the use of the system itself. He said that if the entire system had been deficient, he would have expected more leaks and also that the fact that the leaks were concentrated on the 5th floor suggested problems with the flashing rather than with the window systems. He agreed with the findings of Trow Inc. in this respect and with the remedial action taken.

He also agreed with the observations and the recommendations of the Morrison Hershfield Report. He agreed with the findings of Mr. Keller with regard to the excessive weight from the curtainwall pressing down on the sill and its bottom causing it to tip inwards and to the cause of this being insufficient support at each floor on the way up. He said this would have been an original fabrication error. However, he said even if this had caused the whole system to shift, it would not have required the replacement of every window.

Mr. Brook looked at the manufacturer's load charts and the wind charts and he said the framing of the window system was strong enough. He said there is no doubt that the original system could have been re-anchored and it would then have been structurally sound. Mr. Brook said that the cost of doing the necessary remedial work to each building should have been in the range of \$50,000-\$60,000 or for both \$100,000-\$120,000. To remedy the backward tilt of the sill at the bottom, he said one should have trimmed off the wrongly tipped part and put on a new cap and flashing in the right way which would not be expensive. He said this new flashing would have cost about \$1.00 a foot.

Mr. Brook referred to the fact that the CW1 system relies solely upon the sealing, as the only line of defence against water and he said that caulking does not last forever and that normally after seven or eight years, some of it will need renewal and this is sometimes required earlier. The absence of weepholes in a CW1 system is not a deficiency (indeed such would only allow some water penetration). There was no reason to replace the CW1 installations. Also any problems with the sloped glazing at the top was no reason to replace any other part of the system. Neither did any problems with spandrels give a reason to replace any windows. Neither did the problems of the vertical framing members about which Mr. Keller talked provide a reason for replacing all of the windows. In short, he said that there was nothing among all of the findings of Mr. Keller to make necessary the replacement of all of the windows.

Furthermore, Mr. Brook said that none of the remedial work he was saying should have been done was either very complicated or very expensive. Commenting on the use of the masonite setting blocks, Mr. Brook said that these should not have been used in the CW2 systems because with the rain screen principal, water will get in to these areas where they are and will cause them to soak it up and deteriorate. In short, he said it would have been simple to replace these setting blocks in a CW2 system without removing the glass - just remove the snap caps and pressure plates and put the new neoprene blocks in beside the old ones.

Mr. Brook said he had carried out a number of technical audits involving windows and curtainwall systems, some on buildings up to 30 storeys high and involving both CW1 and CW2 systems. He said that, even assuming the system used was appropriate, that the material used was appropriate and the installation appropriately made, he would still expect some windows to leak and require repairs.

Mr. Brook next dealt with the criticisms made of the system made by Mr. Ladouceur. He dealt first with the opinions given by Mr. Ladouceur concerning the recommendations beginning on page 12 of the Morrison Hershfield Report (tab 12 of Exhibit 17) being recommendations for remedial work for curtainwall system CW1.

Mr. Brook produced a graph being a representation windload chart taken from the Kawneer Company (manufacturer of these systems - Exhibit 109). We see from this that the CW1 installation can well sustain the load of six stores contrary to the evidence of Mr. Ladouceur0.

This will depend upon the factors of the length of the span, the width of the span, and the windload. Mr. Brook said that the installation used would support a load of about 24 lbs. per square foot whereas the Ontario Building Code requirement is 17 lbs. per square foot showing that the system had a greater capacity than required.

Mr. Brook then referred to other criticisms of Mr. Ladouceur. Ladouceur had said that a rain screen principal required a multi-story building. Mr. Brook said it is preferable but not required. Ladouceur had said that CW1 cannot have expansion joints, but Mr. Brook said that that did not mean it could not have worked in this application. Mr. Ladouceur said there were no rubber corner blocks. Mr. Brook agreed that they should be there, but said it would have been no big issue to add

them, certainly no need to replace the whole system to add these. Mr. Ladouceur said to add the corner blocks and the setting blocks one would bend the snap caps and pressure plates and break the glass and it was cheaper to put in all new windows. Mr. Brook said that this statement was ridiculous. In doing this, one will occasionally damage a window but this is rare. In re-doing a large building in Halifax, he said they destroyed one snap cap out of 2,000. Exhibit 110 is a picture of a pressure plate removed and replaced.

Mr. Brook said that Mr. Ladouceur is wrong when he said that the face seal design would not work because, in fact, it does work in many buildings. He also said that Mr. Ladouceur was wrong and being ridiculous when he said one would have to remove the glass to install new heal bead of caulking to the windows. The caulking is installed after the glass is in place and not before. Likewise he said Mr. Ladouceur was wrong when he said one would have to remove the glass to install new setting blocks - the new setting blocks can be put in beside the old ones and there is no need to remove the old ones.

Mr. Brook agreed with Mr. Ladouceur that to do the remedial work to the CW1 windows one would have to remove some of the masonry and some of the drywall. However, he said there would be no reason to have to remove all of the windows to carry out this recommendation.

Mr. Brook came next to the opinions given by Mr. Ladouceur concerning the recommendations for remedial work to curtainwall system CW2 on page 13 of the Morrison Hershfield Report.

Mr. Ladouceur's first comment was that upon the removal of the metal caps and pressure plates, these would look like "banana peels". Mr. Brook said this is quite wrong. We have dealt further above with this point.

Mr. Ladouceur also said that one would have to remove the glass and replace it to verify that the inside air seal is satisfactory and also to replace the setting blocks and Mr. Brook said he was wrong on both counts. Mr. Ladouceur also said that one could not carry out recommendation 11 for drilling the weepholes because of the way in which the horizontal mullions were installed. Mr. Brook said this opinion was wrong and in fact the evidence is that this work was done. Mr. Ladouceur also said that one could not have met the Otto & Bryden specifications which were finally followed by using any CW1 installations. Mr. Brook did not agree with this. In support of this, he said he had inspected Mr.

William Teron's unit (#505) a couple of years ago and its windows had never been replaced and are operating properly.

The Tribunal wishes to say at this point that, upon these issues where the evidence of Mr. Ladouceur and Mr. Brook was at variance, the Tribunal prefers the evidence of Mr. Brook. It is true that Mr. Ladouceur saw the actual installation and Mr. Brook did not, but the nature of the issues is such that one can understand them just as well from an accurate description. Mr. Brook was considerably the more qualified expert, his experience was wider with the problems and the actual experiences on some points on this site corroborate his conclusions.

Mr. Brook then presented estimates of the cost of carrying out the work recommended by the Morrison Hershfield Report which he worked out by three different methods.

1. Based on the general experience of himself and other persons of Morrison Hershfield.
2. A comparison with prices on similar work on other buildings.
3. An estimate made by a contractor upon the specification for the work.

On the first basis, the result was \$50,000 per building, on the second \$48,000 per building and on the third \$36,000 per building. This resulted in a total for the two buildings ranging from \$72,000 to \$100,000. Mr. Brook said he had had a good deal of experience with retro-fitting of this type and he is satisfied the cost would not have exceeded \$100,000.

On cross-examination, Mr. Brook said that the original curtainwall was inadequately fastened to the building. He said that when a CW1 curtainwall was used for such a height, it should be supported at each floor slab. He also said that the widespread leakage problem experienced here was consistent with either inappropriate design or an inappropriate construction.

He specifically stated that he disagreed with Mr. Keller that all of the windows had to be replaced and repeated that, while he would not have recommended the CW1 installations in a new building, as installed, it could have been fixed. He said the fundamental thing missing from the CW2 installation was the presence of the weepholes and the fundamental thing missing from the CW1 installation was proper sealant on the face.

With regard to the support of the curtainwall systems, Mr. Brook said that the framing was structurally capable of doing its job and what had to be added was extra anchors as required. With regard to the wooden setting blocks, Mr. Brook said that water penetration would cause their deterioration, but the reverse would not be true until they had actually deteriorated to a certain extent and, at the time of the investigations by Morrison Hershfield to make its report this had not happened.

Mr. Brook said that the systems replaced by the new contract with Phillips included a number of "upgrades" from the original, all of which cost more money. The replacement of CW1 with CW2 installations, the use of heavier or thicker aluminum in the frames (he said the original was sufficient) and a longer term guarantee for the system all constituted such upgrades.

Mr. Brooks was subjected to a vigorous cross-examination at some length by Mr. Campbell, but was not shaken in his testimony in any material respect. When pressed with the fact that the witnesses for the Program had seen the building at material times when he had not, he pointed out that he was disagreeing with their conclusions and not with their observations. He said that if he had used a CW1 installation for a high rise use, he would have supported it at each slab. He took this into account when making his recommendations for repairs. He repeated that while he would not have recommended the installation for a new building, as installed it could be fixed as he indicated. He pointed out that the water penetration would cause deterioration to the setting blocks, but the setting blocks would not contribute to water penetration until such deterioration had taken place which was not the case up to the time of the investigation by the Program's witnesses. On the question of replacement of the whole system, Mr. Brooks said that even if they had to replace the glass (which he did not believe necessary), it still would not have paid to replace all the frames.

Referring to the Technical Audit, Exhibit 25, he pointed out that a flashing problem is a flashing problem and not a window problem, when a flashing deficiency allows water in, it is not necessarily a window deficiency if it does not get out. He also thought it very significant that in the Technical Audit, there was no general criticism of the windows except for the casement windows.

The next witness for the Applicant was Mr. S.M. Plescia who is a Professional Engineer with Morrison Hershfield. He was an apprentice engineer with Morrison Hershfield in 1987 when the firm was retained to make the investigations and make the report

we have at tab 12 of Exhibit 17. Mr. Plescia said they first made a visual survey of the premises and then put up a swing stage from which they made a water hose test of the windows to see where leaks would occur and then reduced the pressure in some units to see if this resulted in more leakage. They took off a number of snap caps and pressure plates to see what was behind them and eventually put them back on. Essentially the observations made are set out in the report, particularly beginning at the top of page 6.

Mr. Plescia said that Mr. Quirouette was his superior at Morrison Hershfield, he helped with the inspection and the recommendations. Mr. Plescia said during cross-examination, that the substance of the report was his and the recommendations also were his subject to review by Mr. Quirouette. He said he was satisfied that their recommendations would have fixed the problems. He found nothing which indicated that they had to replace the whole system.

In dealing with the question of removal and replacement of snap caps and pressure plates, Mr. Plescia referred to a 21-storey building in which they removed and replaced all of these caps and plates.

Mr. Plescia then reviewed the recommendations set out in the report and said that, after all he had heard he is still of the view that if they had been carried out, they would have remedied the defects. His evidence in detail was similar to what is set out in the report.

On cross-examination, he said that when he went to the building in 1987 to begin his work Mr. Teron indicated leaks in eight to ten locations. He said that the setting block problem had not caused any trouble up to that time but, if the glass were not supported by the rubber type blocks then, trouble would have resulted later on when the masonite deteriorated.

Mr. Plescia said that when he examined the windows, the caulking and the seals were not in good condition and that, to an extent these had been relied on to do a job for which they are not intended. Caulking is a sealant and not a structural fastener.

Mr. Plescia stressed, however, that no window system is perfect. He said that the system which is there now and any system may leak in some places some times. He said that what he recommended in the Morrison Hershfield Report would have brought the system to an acceptable level of performance.

Mr. Plescia agreed that corner blocks are an essential

part of the CW2 design and that such had to be installed to make it proper.

On re-examination, Mr. Plescia said that he had consulted throughout with Mr. Quirouette and that he agreed with his recommendations. He said Mr. Quirouette is recognized as an expert in these matters. He also said he would have thought anyone doing the Technical Audit would have commented on the absence of weepholes. Finally he said that he was very surprised that they had replaced all of the glass in the building.

The last witness for the Applicant and the last witness at the hearing was Mr. William Teron, the Chief Executive Officer of both Teron International Urban Development Corporation Ltd. and of Urbanetics Limited. A Curriculum Vitae for him was filed as Exhibit 112 and is quite impressive. He was Chairman of the Board and President of the CMHC from 1973 to 1976, Deputy Minister in the Ministry of State for Urban Affairs 1976 to 1979, and Chairman of the Board of CMHC during the same period. He has been a principal in companies acting as both builder and developer since 1955. One of these built the new Town of Kanata on 3,000 acres - 6,000 to 7,000 homes. Exhibit 85 is a chart of residential homes built by his company since 1955, 5,295 units in Ontario and 6,617 in Florida. He said that they also built three to four million square feet of commercial buildings and space in Canada, the United States and the United Kingdom and also a number of hotels.

Mr. Teron said that he was involved in the conceptual design of these buildings with which we are concerned. The north elevation of them faces the canal and the curtainwall windows were designed to give a panoramic view. The filigree effect provided by the CW1 installation was most effective from both inside and out. Mr. Teron said that the policy of the company in dealing with complaints as to deficiencies in these buildings was always to give the best service possible. He said he wrote to all residents asking them to let the Company know of anything wrong and saying that it would remedy the same.

Mr. Teron said that he reviewed the Technical Audit. He noted the problem with the casement windows and agreed with what was said about them. He also noted that windows altogether occupied a very small part of the whole Technical Audit. Mr. Teron said that his first contact with the Warranty Program was when his son Chris Teron told him that the Program was authorizing the Condominium Corporation to get quotations for replacing all of the windows. He said from his experience with these matters as President of CMHC, he saw some very strange things happening including there being no proper conciliation as provided in the Act

and, therefore, no conciliation decision from which his company could appeal, an apparent intention to pay out an amount greater than that allowed by the Regulations and other equally strange things.

On January 9, 1990, Mr. Teron wrote a four page letter to Mr. R.T. Ryan, Chairman of the Ontario New Home Warranty Program setting out the problems as he saw them at some length and in reasonably strong language. (see Exhibit 113) Almost unbelievably, Mr. Teron received no reply to this letter from Mr. Ryan. If what Mr. Teron said therein was not true in some respects, one would have thought the Program would have wished to put some response on the record. However, later the meeting was arranged at the offices of the Program in Toronto with Mr. Rose, the President of the Program and Mr. Walker and Mr. Moreau.

At this meeting Mr. Teron said, in chief, that Mr. Rose "read the Riot Act" and said that the Program was going ahead with its course of action and was going to send Teron International the bill and if it did not pay the same would issue a Proposal to revoke its registration. He was cross-examined on this point and replied, "They read the Riot Act. They said they would not tell us why they were doing what they were doing and we would only find out if we refused to pay." Mr. Teron said that when he and Chris Teron went to the meeting, they had an agenda which they expected to discuss and they were not allowed to do so.

The Tribunal wishes to make certain observations about this evidence at this point. In the first place, it must be noted that Rose did not give evidence at this hearing and while both Walker and Moreau did there is nothing in their evidence to cast doubt upon the substance of what Mr. William Teron said, corroborated by Mr. Chris Teron. We must find, therefore, that the version of this episode given to us by Mr. William Teron is essentially correct. This conduct at the meeting by Rose, together with the failure of Ryan to respond to the letter adds to the unresolved puzzle of why the Program acted as it did. One can only speculate upon this and doing so would not be helpful.

Other evidence of some importance given by William Teron was that the windows in his unit which are still the originals, have been in place nine years and are still functioning perfectly. He also referred to the fact that with the new window system installed by Phillips, problems with leaks have occurred. (see Exhibit 115 - a newsletter put out by the Condominium Corporation in May 1991 which confirms this)

Finally, Mr. Teron said that the Company did not pay the \$1,524,824.89 demanded of it because it believed the Program had acted beyond its powers and its claim for the same was not legal and because of the course of conduct followed by the Program, this was the first time and place in which the Applicant or Teron International or he or his son had the opportunity to assert their position.

OUTLINE OF THE ARGUMENTS ON BEHALF OF THE RESPONDENT

Counsel for the Program submitted that there were five main issues to be determined being the following:

1. What is the timing and extent of the notice that was given to the Warranty Program in the first year of the condominium corporation's warranty, being the time between October 17, 1984 and October 17th, 1985?
2. Has there been a breach of warranty as defined in the Act? (In other words, is there a record of breaches of warranty sufficient to refuse to renew the registration of Urbanetics?)
3. Was the extent of the remedial work undertaken by the Warranty Program justified given the breaches of warranty that existed?
4. The fourth issue is; was there procedural fairness in respect of the steps:
 - (a) taken by the Warranty Program in carrying out its decision;
 - (b) afforded by the Program to Teron during the conciliation and decision-making process?
5. The fifth issue is, what is the limit of liability of the Warranty Program and correspondingly the limit of liability of Teron as a vendor/builder?

On the first issue, he referred to the evidence noted above as to notice of defects given by the Condominium Corporation and by certain individual unit owners and referred to the decision of the Divisional Court in the case of York Condominium Corporation #528 (1987) 19 CRAT 162.

On the second issue, counsel began by quoting section 13(1)(a) of the Act:

13.(1) Every vendor of a home warrants to the owner,

(a) that the home

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

He referred at length to the evidence of defects in the various reports and given by the witnesses. It was his submission that the evidence clearly establishes construction deficiencies associated with the curtainwall and numerous defects in deficiencies in workmanship and material sufficient to establish not only the breach of warranty in the first instance but also that the failure to address these problems continued this situation as an ongoing one that stretched from May 1986 when the Trow Report was delivered to November 1989 when the Warranty Program confirmed payment for replacement of the curtainwall system.

On the third issue, Mr. Campbell submitted that the evidence of Trow, Morrison Hershfield, Otto & Bryden and Suter-Keller indicates that there were a great many problems associated with construction of these curtainwall assemblies and that there were such numerous defects in workmanship and material that whether the remedy was replacement or retro-fitting, the work would have been extensive. He submitted that the overwhelming preponderance of the evidence is that the retro-fitting could not have been carried out with the expectation that the water problems would be eliminated and that the evidence is that the cost of retro-fitting was similar to the cost of replacement, but without the guarantees that the replacement brings as to the warrantability of the work.

On the fourth issue, Mr. Campbell submitted that: the procedures followed by the Program afforded to Teron every opportunity to respond in respect of the Program's communications regarding Teron's warranty obligations; further, the procedures afforded to Teron every opportunity to remedy warranty obligations determined by the Warranty Program; lastly, the procedures provided to Teron the right to appeal the decision so rendered by the Program in respect of Teron's warranty obligations; and that being the case, procedural fairness was afforded to Teron pursuant to the provisions of the Act.

On this issue, Mr. Campbell relied upon the decision of DeSoto Development Limited (1990) 20 CRAT 177 where the Tribunal said at p.215:

With respect to the question of procedural fairness, it is the view of this Tribunal that the builder has several opportunities to resolve outstanding issues before they come to the stage of receipt of an invoice. Items often appear on the Certificate of Completion and Possession which are to be remedied. Then a further letter is often received by a builder, a copy of which is sent to the New Home Warranty Program. This brings a second opportunity to repair outstanding deficiencies and a third opportunity arises when a conciliation inspection takes place.

Upon receipt of a copy of the Conciliation Report, the builder has the opportunity to comment upon obligations assessed to him with respect to any of the items. In addition, time is given to complete certain repairs and the builder is informed that if the work is not done, the Program plans to act and send out an invoice. There, indeed, may even be a further opportunity to deal with the necessary repairs at the time that estimates are being sought and the work is either to be awarded to another contractor or a cash settlement is being offered based upon the Work Schedule "B" which has been costed. However, these proceedings must end sometime and the procedure is there, when and if the

registration of a builder is challenged for the builder to comment upon the various chargeable conciliations which may be seen on the record.

On this issue, Mr. Campbell finally submitted that even had there been any procedural defect in the long saga of events that led to this hearing, that Teron has had every opportunity, in this hearing to make a defence on the merits. Therefore, any procedural inadequacies that may have existed in the past were certainly cured by its being afforded the opportunity here to defend itself on the merits as to the notice provisions and the existence of the record of breaches of warranty which are the essence of this case.

On the fifth issue, Mr. Campbell submitted that while the limit of liability at the time for the Program to the Condominium Corporation pursuant to the Act and the Regulations was \$20,000 per unit or \$920,000, this is not the limit of liability of Teron International to the Program in these circumstances. He said that, whereas the Warranty Program could not be forced to spend more than the \$920,000 in respect of the claim by the Condominium Corporation, should it spend more in order to resolve warranty items, it is entitled to recover the total of that valid warranty expenditure from the Vendor/Builder pursuant to the latter's statutory and contractual indemnity.

OUTLINE OF THE ARGUMENT ON BEHALF OF THE APPLICANT

Counsel for the Applicant submitted that:

- The critical decision is whether the past conduct of William Teron and Chris Teron is such as to give reasonable grounds for the Registrar's stated belief that Urbanetics Limited will not carry on business with integrity and honesty and in accordance with law.
- The argument must be limited to warrantable items upon which money was paid out.
- The only breach of its obligations on the part of Teron International upon which reliance is placed in the Proposal is a breach of section 4(4)(2) of the Vendor/Builder Agreement which reads:

(2) The Vendor shall diligently perform his warranty obligations under the Act, including his obligations in respect of each warranty certificate issued by the Corporation, and shall indemnify and save harmless the Corporation and its insurers from any loss which they or any of them may suffer by reason of the Vendor's failure to do so. In addition, the Vendor shall indemnify and save harmless the Corporation and its insurers in respect of any loss which they or any of them may suffer owing to any major structural defect which appears within one year from the effective date of any warranty, notwithstanding that the claim in respect thereof is made against the Corporation after the first anniversary of such effective date.

- The Warranty obligation was limited to \$920,000.

Mr. Solomon then went on with his argument under four headings:

1. The question of procedural irregularities.
2. The question of procedural fairness.
3. Whether the Condominium Corporation and the Program were justified in carrying out the total replacement of the windows.
4. Whether the Program is justified in refusing to renew the Applicant's licence?

Under the first heading, Mr. Solomon submitted:

- the Program paid out more than required;
- the Program paid for items which were not warrantable;
- there was no proper conciliation process;
- the Condominium Corporation was permitted to go far beyond the instructions and commitment given to it regarding remedial work to carry out the Morrison Hershfield recommendations.

Under the second heading, Mr. Solomon submitted:

- after dealing properly with the matter for sometime, the Program suddenly and without justification changed the whole approach to Teron International;
- the Program changed from dealing with the matter under section 13 of the Act (a decision thereunder would provide the Vendor/Builder with an appeal) to dealing with it under section 14 which provides no right of appeal thus depriving Teron International of a chance to challenge the decision

until all the money had been paid out;

- when they pulled out all the original window installations they completely destroyed all of the evidence of them and of what remedial work Teron International had done.

Under the third heading, Mr. Solomon submitted:

- all witnesses agreed the windows could have been retrofitted rather than replaced, the only variable was cost;
- the Program never got specifications or costs of carrying out the Morrison Hershfield recommendations;
- the reasons given by Messrs. Otto, Keller and Ladouceur for deciding on replacement were shown to be unsound by Messrs. Brook and Plescia;
- the beneficiaries of the decision to replace were Otto & Bryden, Ladouceur, Suter-Keller and the Program itself (the latter through its 15% override on the total paid out).

Under the fourth heading, Mr. Solomon submitted:

- apart from this building, the Terons and their companies had an enviable and extensive record with no other serious problems;
- there were no serious problems in dealing with deficiency claims by any unit holders in the building;
- the only basis for the Registrar's decision is the failure on the part of Teron International to pay the sum of \$1,524,824.89;
- the failure to pay in theses circumstances is not automatically evidence of conduct lacking honesty or integrity;
- the Program's claim was unreasonable and illegal in several respects and the only way open to Teron International to resist it was to refuse to pay;
- if it had paid this money to the Program, there was no procedure then available to it to claim the same back;
- the unfairness of the conduct of the Program deprived its

Registrar of the ability to make a proper decision in support of his Proposal.

OUTLINE OF THE ARGUMENT OF THE APPLICANT IN REPLY

In reply, Mr. Campbell submitted:

- it is open to the Tribunal to direct the Registrar not to carry out his Proposal upon conditions that a stated amount be paid to the Program;
- there were many breaches of warranty here;
- the Program and the Condominium Corporation were so frustrated by the long delay that it was justified in bringing the matter to a conclusion as it did;
- the replacement recommendations did follow the Morrison Hershfield recommendations;
- no one destroyed any evidence of value as Mr. Brook said he could draw all his conclusions without seeing samples;
- much of what went wrong was the fault of Chris Teron and the Program is asking for cancellation of the registration of the Applicant by reason of all of the circumstances and not just the failure to pay the money;
- all of the violations of the warranties led the Program to have to pay out this money.

DECISION OF THE TRIBUNAL

Having taken into account and considered all of the foregoing evidence and arguments, the Tribunal must now reach its conclusions which are as follows:

1. Question of warrantable defects in the curtainwalls, windows and window systems as installed

The Tribunal finds that, as installed there were defects in the curtainwalls, both in the CW1 and CW2 installations and in the masonry, the flashings and the spandrels forming part of the north wall of both buildings, which resulted in water penetration.

These included the lack of weepholes in the CW2 installation, the use of wooden rather than rubber setting blocks, the absence of corner blocks, the failure to anchor the curtainwall properly at each floor slab, the use of hinges which were too light on the casement windows, the improper application of some of the caulking, the improper installation of some of the flashing and the defective masonry work around and above the windows particularly at the top of the building. In fact, by the end of the hearing there was no serious dispute as to these facts.

2. Question of the extent to which these defects were reported within the one year required to the Program

We have already dealt with the issue of this requirement and the Tribunal's finding that to succeed, the Program must show that all warrantable defects were reported within the time limited by section 13(4) of the Act. The only written notice of defects in the common elements of the buildings which came to the Program within the time limited was contained in the Summary of the Technical Audit which was sent to the Program by the Condominium Corporation with the letter of September 9, 1985 (tab 2, Exhibit 16) and the only references in it which relate to the curtainwalls and the window systems are items 40 and 41 both dealing with casement windows. If this were all of the evidence available to the Program on this point, it would have probably have failed on this issue.

However upon the authority of the case of York Condominium Corporation #528, we must also take into account the notices of claims put forward by unit owners as outlined above. In this case, the Divisional Court was dealing with a situation where notice of one year warrantable defects in common elements of a condominium building had not been given to the Program by the Condominium Corporation, but notice of them had been given to it by certain unit owners within that time. The Divisional Court overruling the decision of the Tribunal held that the giving of the notice in this way was a compliance with the statutory requirement and allowed the claims of the Condominium Corporation. At page 182, the Court says: "The Condominium Corporation for the purposes of this appeal and in accordance with the relevant statutes are deemed to be the owners of the common elements, although in actual fact the unit owners own the common elements as tenants in common."

When one looks at and compares the facts of that case with this one, one must conclude that the complaints of the unit owners in this case more closely cover the claims of the

Condominium Corporation than was the case in the York Condominium Corporation #528 and the Tribunal therefore must find that the Condominium Corporation was within the provision of section 13(4) to claim for these deficiencies and, therefore the Program was correct in treating them as warrantable deficiencies. In fact, throughout all of its dealings with these problems Teron International never took the position that it had no obligation to the Program for this reason, although at this hearing the issue was raised and explored by Counsel as a possible defence.

3. Question of what was the responsibility of Teron International to meets its obligations under section 13(1)(a) of the Act

The rules are clear that in all circumstances where an owner has established warrantable defects on the one hand the owner is entitled as against both the Vendor/Builder and the Program to have remedial work done to bring them up to the standard required by the section, but on the other hand both the Vendor/Builder and the Program are entitled to have this done by the method which will achieve this properly at the lowest reasonable cost.

The Tribunal finds that the proper remedial work to be done on this basis was that which was, in fact, done by Teron International plus the additional work required to carry out the recommendations of Morrison Hershfield and of Mr. Brook. We have discussed the evidence relevant to this issue at length above. We prefer the evidence and the opinions of Mr. Brook and Mr. Plescia to those of the witnesses for the Program. We appreciate that some of these had first hand observations not available to Mr. Brook, but the nature of the issues to be determined are such that they are essentially opinions to be formed upon facts which were established. Mr. Brook's experience and qualifications show him clearly as a top expert in this field in Canada, his conclusions and opinions were clearly and logically reasoned and stated with no room for doubt and they confirm and are confirmed by the Morrison Hershfield Report which was, in fact, accepted by everybody who received it including the Program, and from which departure was taken by the Program only after some unusual and, to some extent, unexplained conduct on the part of a number of people. Therefore, when the Program reached the decision that the remedial work should be completed in accordance with the Morrison Hershfield recommendations and so advised by the Condominium Corporation and Teron International all of the parties were, at that point, "on the right track".

For what happened next, both parties must be found partly at fault. For its part, Teron International is to be criticized for not getting on faster with implementing the Morrison Hershfield Report. If it had moved with more dispatch, it should have been able to get this done.

For its part, the Program is to be criticized because, although it instructed the Condominium Corporation to get quotations based on the Morrison Hershfield Report it completely confused the issue by instructing that these follow the Schedule "A" enclosed which bore little relation to that report and then allowed the Condominium Corporation to change the whole thing without any real consideration of whether there was a basis for doing so and, indeed, without ever even raising this question. It is incomprehensible that the Program authorized and paid for the replacement of all of the sliding doors concerning for which there is no record of a single complaint and all of the windows of the other three sides of both buildings, concerning which only a very few were ever the subject of complaint and most of these having been fixed, and the evidence was that any not fixed could be so fixed.

4. Question of what should have been the cost of the proper remedial work to complete the Morrison Hershfield recommendations

We do not have as good evidence on this point as one could wish, but the Tribunal should make findings in answer to this question as best we can upon what we have. The best evidence we have is that of Mr. Brook who, using different methods of calculation arrived at a figure of \$120,000 to which he said should be added some amounts for anchors at each floor, some additional flashing and some other incidentals. It seems reasonable to us to add \$25,000 for these purposes for a total of \$145,000.00. If we add the Program's charge of 15% to this figure, we get \$21,750 or a total of \$166,750.00.

We get some corroboration of these figures from the estimate of and the bill of Phillips found at tab 47 of Exhibit 16 from the seventh sheet thereof by listing and totalling the items therein which would be required as part of the retro-fitting described by Mr. Brook.

General Requirements	\$15,000.00
Temporary Facilities	2,500.00
Caulking	4,600.00

Swing stage	26,000.00
Cleaning	8,500.00
Regular and final clean-up	6,000.00
Supervision (say 50%)	16,000.00
Miscellaneous small items	<u>1,500.00</u>
	\$80,100.00
Add labour (say)	25,000.00
Add for anchors, flashing and incidentals	<u>25,000.00</u>
	\$130,100.00
Add 15% for Program	<u>19,515.00</u>
	\$149,615.00

We appreciate that these are rough calculations and that Phillips' items do not exactly parallel the work we are valuing, but the similarity is sufficiently close that they provide some corroboration of Mr. Brook's figures. The only other evidence we have on the point is that of Mr. Ladouceur who estimated it would cost \$300,000.00 to repair the CW2 window system and \$500,000.00 to repair the CW1 system. These estimates are obviously far too high and are not helpful. The Tribunal therefore finds that the amount for which Teron International should have been liable for the completion of the remedial work by the Program was \$166,750.00.

Having come to this conclusion, it is not necessary to deal with the issue of what was the limit of the amount which the Program could pay to the Condominium Corporation and recover the same from the builder pursuant to the Vendor/Builder Agreement. However, both parties addressed this in argument and it may be of consequence that we address it. There are really two issues here.

1) What was the monetary limit of the responsibility of the Program to the Condominium Corporation at the material time?

2) Can the Program pay more to the Condominium Corporation by way of remedying warrantable defects than required but still recover the same from the builder?

It is clear that the statutory and regulatory limit upon the total for which the Program could be called to pay to the Condominium Corporation was \$20,000 times the number of units or \$920,000. This was the limit when the warranty came into place

upon the registration of the condominium and the fact that the regulation was later amended to \$50,000 times the number of units did not affect the warranty herein. This was a substantive and not a procedural provision and its effect should not have retroactive effect unless specifically so stated. Even Mr. Campbell did not put his case so much that way but rather on the second issue that, where the Program pays out money necessary to remedy warrantable defects, it can recover this from the builder, regardless of what its obligations under the foregoing regulations were.

The determination of this issue turns upon an interpretation of clause (2) of paragraph 4.4 of the Vendor/Builder Agreement with Teron International found on the third page of tab 4 of Exhibit 17 and of which the relevant part reads:

"(2) The Vendor shall diligently perform his warranty obligations under the Act, including his obligations in respect of each warranty certificate issued by the Corporation, and shall indemnify and save harmless the Corporation and its insurers from any loss which they or any of them may suffer by reason of the Vendor's failure to do so..."

It is clear from this wording that Teron International's obligations to the Program are by way of an indemnity for monies which it might be forced to pay out by reason of the failures of Teron International stipulated in the clause. It is a clear and well established principle of law that a guarantor or party liable upon an indemnity contract is only liable for so much as the party indemnified is legally required to pay to a third party and, if the party holding the indemnity chooses to pay more than so legally required, it cannot recover the extra amount from the guarantor or party giving the indemnity.

5. Question as to whether, upon these findings, the past conduct of William Teron and Chris Teron affords reasonable grounds for the belief of the Registrar that Urbanetics Limited will not carry on its undertaking in accordance with law and with integrity and honesty.

There are certain principles of law laid down in previous authorities to which we wish to refer particularly in dealing with this question. The first is that section 7(1)(c)(ii) of the Act gives to the Registrar a discretion to refuse or revoke the

registration of a corporation where "the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty."

The second principle is found in a decision of this Tribunal in the case 982681 Ontario (Griffin Construction) issued on October 6, 1993 in which it is stated at the bottom of page 7 of the Reasons for Decision and Order issued:

It is also important to note that the stricture placed against the Applicant by the statute is not that a registration should not be granted to a company if there is an unpaid debt to the Program by one of its officers or directors or by another company of which such officer or director was also a director or officer or in which he was in some way a principal. In other words, the Registrar cannot use this proceeding simply as a method of trying to collect an unpaid debt of this kind. The stricture placed against a corporate applicant is that it should not receive its registration if the "past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity or honesty." So the registration should not be refused simply because the Program has not been paid. It should only be refused if the conduct of Mr. Griffin in dealing with the earlier problem leading to the \$2,075 debt is such as to lead a reasonable person to conclude that he is less than honest and lacks integrity. The fact is that he has broken no law in anything he has done and he stated very strongly in his evidence that he did not believe that he had engaged in any misconduct or conduct in which he should have to accept any criticism for being dishonest or for lacking integrity.

Counsel for the Program relied upon the decision of the Tribunal in the case of Norhome Developments Inc. (1986) CRAT 154. In this case, the principal officer of the

Applicant, one John R. Newton, had been the principal in another company, Safari Developments Ltd. which had defaulted on a debt to the Program of \$38,677.96 paid for warranted repairs to some 33 houses. As conditions of granting registration to Norhome, the Registrar required:

- a) A cash payment of \$20,000.00 up front. This will be considered as the first instalment of the over \$38,000.00 owed to the Program.
- b) Security in the amount of \$20,000.00 (i.e. \$1,000.00 per unit) based on the number of units proposed for the up coming twelve months. This is security normally required of all registrants who have had a history of claims experience with the Program.
- c) After the first year of registration, fifty percent of the security will be refunded and the remaining fifty percent will be retained and put towards the balance of money due to the Program.
- d) After the first year of registration, the matter will be reviewed and a decision will be made with respect to the remaining \$8,000.00.

The Tribunal upheld the Registrar and directed him to carry out his Proposal and in the course of its reasoning quoted the provisions of section 7(1)(c) of the Act:

"(1) An applicant is entitled to registration by the Registrar except where,

- (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty; or
- (d) in the case of an application for registration as a builder, the applicant does not have sufficient technical competence to consistently perform the warranties.

and went on to say on page 156:

To protect the public trust, the legislation requires the Registrar to look behind the corporate veil and it is clear under these provisions that in the case of a corporation, the past conduct of its officers and directors may be taken into account in determining whether to grant registration.

and on page 158:

No one argued that there is a legal obligation on either Norhome or Mr. Newton personally to indemnify the Program on behalf of Safari. But, as the Tribunal understands the argument of counsel for the Registrar, the failure to indemnify the Program with respect to the Safari claims shows a lack of integrity on the part of Mr. Newton. As counsel put it, Mr. Newton just "chose to walk away" from the corporate obligations. It is this past conduct of Mr. Newton to which the Registrar points in support of his Proposal.

and on page 159, the Tribunal finds:

The Tribunal finds that during 1979 and 1980, when granted that Safari was in financial difficulty, Mr. Newton as principal officer and directing force of Safari did not conduct himself with integrity with respect to Safari's undertakings, and that the Registrar was not in error in concluding that the past conduct of Mr. Newton afforded reasonable grounds for belief that Norhome's undertakings will not be carried on in accordance with law and with integrity and honesty.

and on page 160:

If the Program pays for the repairs, it is incumbent upon the builder by the terms and conditions of registration that the builder indemnify the Program for these costs. The Tribunal finds that the large number of claims against Safari, even though some were of a minor nature, indicates that under Mr. Newton's control and directions, Norhome does not have sufficient technical competence consistently to perform the warranties under the Act.

Counsel quoted and relied specifically upon these passages in that judgement.

The first passage relied upon by counsel for the Registrar from page 156 is simply a statement of what must be done by the Registrar and the Tribunal to apply the statutory provisions - of what must be taken into account. The second passage from page 158 is the argument on behalf of the Registrar in the Norhome case and in this one. In the Norhome decision, the

Tribunal follows this passage with a statement of the answer made to it by Norhome.

Counsel for Norhome on the other hand submitted that since there was no legal obligation on the part of Norhome or Mr. Newton to indemnify the Program, then there can be no lack of integrity on the part of Mr. Newton if he chose not to do so.

It is the Tribunal's view that the critical question here is one which must be determined in each case where it comes up upon the facts of that case. In the Norhome case, the Tribunal made a specific finding that Newton did not conduct himself with integrity (note the passage quoted from p.159). In the Norhome case, there were 33 claims, numerous breaches of warranty and a history of problems spread over a considerable period of time and also a serious question as to whether Norhome had sufficient technical competence to perform the warranties under the Act. In this case, the evidence is that there was only this one house built by Bradford which gave rise to any warranty claim, no other history of problems and no question of competency. On all of this evidence, the Tribunal cannot find that Mr. Griffin conducted himself with a lack of integrity or acted dishonestly.

The Tribunal had the advantage of observing Mr. Griffin in the witness box and hearing the vehemence with which he put forward both his evidence and his arguments and has no hesitation in accepting his sincerity in his position. There appears to have been no dishonest motivation on Mr. Griffin's part for any of his conduct herein and, therefore, the Tribunal must conclude that this conduct does not afford reasonable grounds for the Registrar's belief. The Applicant has therefore met the test laid down by Southey J. and the Tribunal must conclude that the Registrar was in error in his conclusion. In fairness to the Registrar, it should be

added that the Tribunal had a considerably better and thorough exposition of the facts than were available to him.

Another consideration which the Tribunal considers important in this case is the fact that the Registrar, the exercise of whose discretion we have to consider, is the very person in the Program who has to take a large part of the responsibility for decisions which we have found to be peculiar to say the least, and whose conduct at the final meeting with the Terons was such that we would not think it should be standard procedure. With all of these considerations in mind, the Tribunal has reached the conclusion that it should now form its opinion upon the critical question and as provided by subsection (3) of section 16 of the Act substitute that opinion for that of the Registrar set out in the Proposal.

The Tribunal does not find that the conduct of William Teron and Chris Teron in refusing to cause Teron International to pay \$1,524,824.89 to the Program affords any reasonable grounds for belief that the Applicants' undertaking will not be carried out in accordance with law and with integrity or honesty. While we have set out above certain criticisms of Teron International (and therefore of the two men who substantially control that company), none of these encompass any dishonesty or lack of integrity. The conduct of the matter by the Program was such that the only course available to the Terons to dispute the position of the Program and resist this very large and, in the result, unjustified claim was to do exactly what they did. We must, therefore, find that the sole ground upon which the Registrar bases his Proposal cannot be supported.

6. Question of the Order which should be made herein

Upon the foregoing finding, the Tribunal would probably be justified in simply making an Order directing that the Registrar not carry out his Proposal. However, there are reasons why we should consider an alternative to this conclusion. It is our view that, upon the findings which we have made, the Program would now be justified in demanding payment from Teron International of the sum of \$166,750.00 and, if the same were not paid within a reasonable time, to put this failure forward as the basis of a new proposal to the same effect as this one except for the amount involved. We have to consider whether we have jurisdiction to make such an alternative order herein. In his argument in reply, as

noted above, Mr. Campbell strongly submitted that we have such jurisdiction and for reasons which we shall outline briefly we accept his submission.

It does not seem right to require the Registrar to have to issue a new Proposal and perhaps have to come back to this Tribunal a second time with such Proposal based on a fact situation which has been established after such a long and thorough hearing. It is also perhaps important on this point to keep in mind that, while considerably the greater of the criticism for the mismanagement of the whole matter rests with the Program, the Applicant is not free from blame. If it had carried out the recommendations of Morrison Hershfield with dispatch, that should have been and end of the whole matter. Also, if as soon as it got a copy of the letter of June 3, 1988, it had gone after the Program and insisted that proper instructions for quotations and tender be issued on the basis of the Morrison Hershfield Report, the Program would likely have corrected the mistake in accordance with its own decision to proceed on that basis. On the other hand, if the Program had refused to put it right in those circumstances, it would have been clear to everyone at that time, that the total responsibility for the mishandling of the matter rested with the Program.

Therefore, we are of the view that the provisions of Section 16(3) of the Act give us authority to make the order hereunder:

Section 16(3)

...and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

Accordingly we have concluded that the Order we should make is that the Registrar should renew the registration of Urbanetics Limited on condition that there be paid to the Program on behalf of Teron International Urban Development Corporation Ltd., the sum of \$166,750.00 within a reasonable time.

By virtue of the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs that:

- (1) There shall be paid to the Ontario New Home Warranty Program on behalf of Teron International Urban Development Corporation Ltd., the sum of \$166,750.00 within 90 days of the date of the issue of this Order;
- (2) That in the event, the said sum of \$166,750.00 is paid as directed, the Registrar shall not carry out his Proposal;
- (3) That in the event the said sum is not paid as directed, the Registrar shall carry out his Proposal.

The above decision was appealed to the Ontario Court (General Division) Divisional Court. The appeal had not been concluded at the time of this publication.

WATERLOO NORTH CONDOMINIUM CORPORATION NO. 118

**APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT**

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH KILLORAN, Chair, presiding
SELWYN CHARLES, Member
JOHN HURLBURT, Member

APPEARANCES:

IRWIN DUNCAN and ERIKA S. TRAUB,
representing the Applicant
BRIAN CAMPBELL, representing the
Ontario New Home Warranty Program
JEFFREY LONG, representing L & G Enterprises Corp.

DATES OF 18, 19 January; 9, 10 March;
HEARING: 20, 21 April 1994

REASONS FOR DECISION AND ORDER

The Applicant appeals the decision of the Ontario New Home Warranty Program contained in a Conciliation Report dated September 24, 1992 and a letter dated October 6, 1992. The conciliation of deficiencies was based on a technical report by Building Inspection and Engineering Associates Inc. which was date-stamped October 4, 1991. This is an application under section 14(1)(b) and (c) of the Act.

Waterloo North Condominium Corporation No. 118 is a five-storey high-rise with a total of 37 units. This project is of concrete construction with a brick veneer and has an underground parking garage with approximately 50 parking spaces. It was approved for design by the City of Waterloo in the Site Plan Agreement. The following dates were agreed upon to determine the warranty coverage applicable, the Ontario Building Code applicable and the warrantability of the deficiency list:

- 1) Date of Registration and Enrollment with the Program by L&G Enterprises Corporation (the "Builder") was February 25, 1987;
- 2) Permit was issued in the City of Waterloo on November 14, 1986;
- 3) Condominium Project was registered on September 29, 1988;

- 4) Warranty Coverage for the common elements began on July 29, 1988;
- 5) Claim letter forwarded from the Applicant to the Program on December 4, 1990.

The state of the underground parking garage is a continual source of grief to the residents of the condominium in question. The Applicant claims that the Kitchener office of the Program received notification of the leakage claim in February of 1989 and sent Peter Taylor of that office to investigate cracking and leaking. Despite the testimony of Theresa Roddy that she had verbally notified the Program of problems with the leaking underground parking garage, there was no written complaint to the Program until after the expiration of the two year warranty program. The regulation to the Act requires that each person with a claim under the Plan must give written notice to the Program.

Counsel for the Applicant relied on a letter dated June 6, 1989 from the Program to Ms. Roddy advising her that she was restricted to complaints about deficiencies in her unit and any deficiencies relating to the common elements were to be addressed by the Board of Directors of the condominium corporation. Two unitholders gave evidence about the composition of the Board of Directors, which they claimed was controlled initially by representatives of the builder. For these reasons, counsel for the Applicant made an estoppel argument to the effect that the requirement for written notice under the Act should be waived.

While the Tribunal has a good deal of sympathy for the Applicant in this case, it is, at the same time, bound to apply the Act which is quite specific about the requirement for written notice. To date, all of the case law has supported the proposition that written notice must be given. As that requirement was not met, the Tribunal finds that the warranty period relating to water penetration had expired. The remainder of this decision will deal with the applicant's claim that the leakage problems in the underground parking constitute a major structural defect. The claim for damages because of a major structural defect must be made within five years of the date specified in the certificate of completion and possession, where a home was enrolled before December 31, 1990. It is acknowledged by the parties that this application was made within the applicable time period.

Norman Kaye, president of the Board of Directors for the condominium corporation from 1990-1992, testified that there was a lot of leaking in the underground parking garage from the time of occupancy and continuing after a waterproofing membrane was installed in June of 1988. Mr. Kaye was a most reliable and impressive witness. He had extensive and precise notes and was forthright and knowledgeable when giving testimony. He described the membrane as similar to rubber sheathing on top of a

cement slab which was the roof to the garage. He described what he said was a "disastrous situation" in February of 1988 when there was such serious flooding that some residents had to have their cars professionally cleaned due to the lime residue deposited.

Mr. Kaye testified that the leaking never stopped except in the extreme cold or during protracted periods of dry weather in the summer. A series of band-aid solutions attempted to correct the leakage problem. In November of 1989, troughs were bolted to the underside of the roof slab. They acted similarly to eavestroughs to divert the water. In February of 1989, epoxy resin was injected in the cracks. This seemed to worsen the problem. In 1991, fifty holes were excavated outside and urethane was injected in the curb lines above the ground. Extra drains were installed in the slab. All of these measures helped but didn't solve the problem.

It was Mr. Kaye who wrote a letter dated December 4, 1990 to the Program outlining the nature of the problems with leakage in the underground parking garage. He described an inspection conducted by Mr. Taylor of the Program on December 5, 1990 and various conversations with him until May 7, 1992. Follow-up letters were written by Mr. Kaye to the builder, the Program and the City of Waterloo.

Peter Scott, an engineer with the firm of Sze Straka Engineers Ltd., gave evidence on behalf of the Applicant. The Tribunal was impressed with his expertise, thoroughness and candour when testifying. He carefully guided the Tribunal through a series of photographs documenting the nature of the cracks and leaking in the parking garage. As well, he meticulously reviewed the findings contained in his engineering report entitled, "Review of Parking Garage Deficiencies, 300 Keats Way, Waterloo, Ontario".

Mr. Scott, on page 35 of his report, summarized his conclusions and recommendations. He concluded that water leaks into the garage during much of the year through the roof slab at many locations spread throughout the garage and along the connection to the retaining wall near the rear of the property. It was his conclusion that leaking of water into the garage represents a major structural defect. He based this conclusion on the requirement that the design and construction of structures, such as this parking garage structure, involves ensuring both safety and serviceability. According to him, while safety involves ensuring that load-bearing members and the structure as a whole have sufficient load-carrying capacity, equilibrium and stability, serviceability involves ensuring that the structure behaves in a manner which will not restrict or limit the normal use and occupancy or durability of the structure.

It was Mr. Scott's view that water leaking through cracks in the roof slab onto cars in the parking garage constitutes failure of the serviceability requirement of the parking garage. This problem interferes with and limits the normal use of the garage for the purposes intended. He also concluded that water leaking through the concrete roof slab constitutes failure of the durability requirements of the parking garage. Water leaking into the concrete could promote corrosion of the reinforcing steel within the concrete. According to Mr. Scott, this problem would significantly increase the rate of structural deterioration of the garage and reduce the expected service life of the structure.

Mr. Scott recommended that the parking garage be repaired to restore the serviceability and durability of the structure. He anticipated such a repair to include removing all landscaping, paving, curbs and existing membrane from the upper surface of the parking garage and installing a slab overlay to create a sloped surface to the concrete slab and a new waterproofing membrane properly installed on the overlay. He recommended that the waterproofing be designed, detailed and installed to meet the requirements of the Ontario Building Code and recommendations of the Program's publication "Condominium Construction Guide 1993".

Tibor Pal, an engineer, testified on behalf of the Program that in his view, the parking garage in question was "state of the art" for 1986. He discussed the problems with parking garages in the 1980's and outlined the process for updating CSA standards which are referenced in the Ontario Building Code. He explained that the standards which are applied today can not be applied retroactively to a structure built in 1986.

Counsel for the Applicant argued that the parking garage structure was not designed to leak. He relied on the testimony of Scott, Kaye and Roddy to confirm that there was a huge network of leaks through the roof slab such that the roof of the garage was like a bathtub which leaked most of the time. The major deficiencies, according to him, were:

- 1) the waterproofing membrane was not continuous;
- 2) care was not taken in placing the concrete so as to prevent cracking;
- 3) the membrane was not protected, preferably with board.

Counsel went on to explain that water which penetrated the cracks in the slab was able to migrate and this problem was compounded by improper drainage. Counsel noted the lack of a closure strip in the roof slab and the need for more pours of the concrete together with expansion joints. He referred to page 10 of the engineering report prepared by Ralph Brook that indicated a sample of concrete tested for calcium nitrite revealed only a trace, which was inadequate to meet quality standards. Counsel

commented on evidence of "honeycombing" and sand pockets together with wood buried in the concrete.

Counsel noted that there were no details relating to the installation of the waterproofing membrane in the building plans or the architectural drawings and commented on the lack of involvement by design professionals. As a result, the membrane did not lap up by the required amount and it had no protection board. The curbs were part of the waterproofing system and lacked reinforcing material resulting in serious cracking. According to counsel, the deficiencies included the lack of a closure strip, any waterproofing detail, mechanical fastenings pulling away, inadequate calcium nitrite, and significant rusting.

Counsel argued that there were Ontario Building Code violations in the construction of the parking garage structure. Although there was some discussion as to which version of the Ontario Building Code applied to this structure, it was eventually agreed by all parties that it was the Ontario Building Code of 1983 which should be applied. Counsel directed the Tribunal to Article 9.13.1.5 which deals with the roofs of underground structures and requires that they be waterproofed to prevent entry of water to the structure. Article 2.5.1(1) requires the waterproofing system to be designed by professionals, which counsel argued was not the case.

Counsel went on to discuss the concept of "limit states design" which had been introduced by Mr. Scott and stated that the structure was not serviceable since there was more than sporadic leaking such that people and cars were not protected from the elements. This leaking which causes the leaching out of chemicals in the concrete would accelerate deterioration. The primary aim of limit states design is to prevent the attainment of limit states, that is to prevent various kinds of failure.

Counsel for the Program reviewed the requirements for a major structural defect:

- (o) "major structural defect", means, for the purposes of clause 13(1)(b) of the Act, any defect in work or materials,
 - (i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
 - (ii) that materially and adversely affects the use of such building for the purpose for which it was intended,
 including significant damage due to soil movement, major cracks in basement walls,

collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

Counsel argued that any deficiencies in the waterproofing membrane could not be said to affect the load-bearing function of the structure. He pointed out that cars were parked in the garage on a regular basis although there was some shifting of cars to dryer areas. He referred to the Kennedy case, 11 CRAT 109, which established that a major structural defect must render a home uninhabitable and in danger of imminent collapse. He argued that even if there were a defect in the workmanship and materials, which he insisted had not been established, there is a specific exclusion in the definition of major structural defect for "dampness not arising from failure of a load-bearing portion of the building...".

Turning first to the issue of a defect in materials, he insisted that the evidence pointed to no problem with the materials. With respect to workmanship, although the membrane may not have lapped up vertically, minimal leakage could be attributed to that defect. Only two examples were in evidence of missing mechanical fasteners on the vertical. Although there was a lack of slope in the roof, Mr. Pal's evidence was that the OBC did not require a certain slope. Although the membrane was not continuous, the architectural and structural drawings did not set out the required details. The architect who designed the building approved the system and his certificate dated May 25, 1989, confirming that the building had been completed in accordance with the OBC and building permit documents was submitted in evidence.

Counsel pointed out that although a continuous membrane may have become more common practice, it was not so in 1986. As well, he noted that of twenty-two references to various documents relating to construction requirements for underground parking structures, only three pertained to the statutory requirements of the builder. None of the other standards were referenced in the OBC.

Counsel for the Program insisted that the only defects that could be attributed to the builder were the lack of mechanical fasteners and the failure to lap the membrane to sufficient height. He argued that if there were design flaws, responsibility rested with the engineer or the architect and not the builder and the condominium corporation had civil remedies. He relied on the

York Condominium Corporation No. 340, 10 CRAT 122, for the proposition that "design flaws" are not proof of flaws in workmanship.

Most compellingly, counsel pointed out that there is no reference in the definition of a major structural defect to non-compliance with the OBC. He convincingly argued that, at best, this claim concerned a leaking waterproofing membrane and was not a loadbearing problem. As such, it amounts to an exception in the definition of a major structural defect.

Counsel for the Applicant claimed that the Program was not grasping the thrust of his argument that the CSA standard A23.3-M77 was referenced in the 1983 OBC and that the OBC was not complied with in the construction of this parking garage. He argued that the failure of the waterproofing system would affect the load-bearing function of the structure in the future. However, no evidence was presented that the load-bearing function of the structure in question is materially and adversely affected at present.

The Tribunal finds that even, if the evidence were conclusive that there was a defect in work or materials, which it is not, there is no evidence of a failure of the load-bearing portion of the building nor is there sufficient evidence that the load-bearing function is materially and adversely affected. As well, the second part of the definition of "major structural defect" is not met as the evidence does not establish that the parking garage structure was so materially and adversely affected that it could not be used for the purpose for which it was intended.

The Tribunal was most sympathetic to the claim of the Applicant in this case and most impressed with the quality of the testimony presented by its witnesses. However, the Tribunal is mindful of the restrictions placed on it by the statute in question and does not find that the claim advanced meets the definition of a "major structural defect" found in the Act. The case law established by this Tribunal has set a very high threshold for allowing claims on the basis of a "major structural defect" and it is the view of the Tribunal that the test has not been met in this case.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal upholds the decision of the Ontario New Home Warranty Program to disallow the claim of the Applicant.

The above decision was appealed to the Ontario Court (General Division) Divisional Court. The appeal had not been concluded at the time of this publication.

WATERLOO NORTH CONDOMINIUM CORPORATION #125

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
GURDIAL SINGH FIJI, Member
ALBERT LONGO, Member

APPEARANCES:

MARK GROSSMAN, representing the Applicant

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 25 November 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by the Board of Directors of Waterloo North Condominium Corporation #125 from the decision of the Ontario New Home Warranty Program disallowing certain claims for repairs to the building.

It is acknowledged by the parties that the claims fall outside the limitation period of one year for defects to materials and workmanship under section 13(1) of the Act and, therefore, involve major structural defects as defined under section 1(o) of Regulation 726.

The issues advanced by the Corporation before this Tribunal are:

1. Roof framing
2. Factory-built fireplaces/chimneys
3. Wood privacy decks

Gerard P. O'Rourke, a private building inspector and consultant on residential buildings gave evidence on behalf of the Condominium Corporation. He pointed to the distortion of joists with no support underneath them. When the roof trusses are designed not to be cut or altered then any subsequent change affects the whole building, he said.

With regard to the fireplaces and chimneys, Mr. O'Rourke said there are test standards which apply to the installation. The components are satisfactory, but the installation is an infraction of the test standards which are the only ones permitted.

He pointed out the infraction referred to in the report of K-W Home Inspections Inc. of December 1992 (Exhibit 10):

2. Factory-Built Fireplace/Chimneys

The installation of the factory-built fireplace chimney pipes do not conform to the requirements of the O.B.C. [Clauses 9.22.8.21 and 9.34.2.1...]

The difference between the test standard and the installation is in the angles which should not be less than 45 degrees, the angle required for proper draft. He said this was supported by the letter of March 11, 1993 from the Polar Company:

Further to our conversation of March 10, 1993, I would like to confirm that all the installations we discussed must have their chimneys corrected. This includes the fireplaces which have had gas logs installed on them.

With or without gas log sets installed, these fireplaces should not be operated until the chimney configurations are corrected.

The witness testified that the wood privacy decks of some eight or nine units had been affected by grading and there is a deficiency in framing with respect to span post anchorage and one beam does not conform to the Ontario Building Code, subsection 9.23.8.5. He said the decks share a common privacy fence and are joined together so that if there is movement in one it causes the rest to move.

On cross-examination, Mr. O'Rourke said the structure of the decks carried their own weight and on the second floor were not fastened to the building. He admitted there was no failure of the load-bearing portion of the building. The only damage if it could be so termed was the deflection of the beam on unit 1, but that was not really damage. He said he observed no structural damage in any of the units and no signs of collapse in the decks. His concern was the possibility of a safety hazard and the Code violation. He admitted, however, that this has not prevented the use of the units and the decks or restricted it.

Beverley McFalls, a unit owner since December 1988, said she first used the fireplace when she took occupancy and it worked well. But the second time, she had to leave the unit because of a backdraft. She has now put in gas logs and has continued to use it. She said she knew of other units in which the fireplaces were being used.

Mr. Louis Smith in his evidence said he had owned unit 6 since September 1991 and had the deck fastened to the building since he felt it was unsafe.

Mr. Brian Haskett, currently Operations Manager for the Ontario New Home Warranty Program, in his evidence observed he had been a conciliator for the Program for four years involving condominium construction and had had twenty-three year's experience with high rise construction. Mr. Haskett is a civil engineering technologist and said that in his experience he had inspected over 700 buildings. He pointed out that the condominium in question had been registered on February 16, 1989 and the only warranty for common elements involved proof of a major structural defect.

On September 21, 1993, Haskett together with representatives of the appellants attended at the premises to conduct an inspection. His report was tendered as part of Exhibit 9, tab 18. With regard to the roof framing, he said he found deficiencies in trusses where they had been cut to accommodate the chimney and not properly repaired. The deflection he said was less than 1/2", but there was no damage evident. He continued that the repair involved only installing a header across under the supervision of a structural engineer. This is done frequently in wood frame construction he said and with an estimated cost of approximately \$150.00. He pointed out that he had attended unit 16 specifically since it had been singled out as defective by the appellants.

With regard to the fireplaces which were factory built, he said there were defects in workmanship but there was no resulting failure in the load-bearing portion of the building or effect on its use.

The wood privacy decks, he testified, were not a load-bearing portion of the building and carry only their own weight. He agreed, however, with Mr. O'Rourke that there were deficiencies but there was no danger of collapse.

Cross-examined by Mr. Grossman, he agreed it was improper to cut roof trusses unless under the direction and supervision of a professional engineer because only the engineer can properly measure the weight and protect the structural integrity of the building.

With regard to the decks, he agreed there was some movement in them, but it was not significant and he could see no abnormal deflection.

It is argued by Mr. Grossman that the defect in the fireplace chimneys affects the use of the building for the purpose for which it was intended. "The key factor", he said, "is the effect and not the extent of the cause." It was evident the deck was not safe as Mr. Smith had testified and had to be attached to the building. With regard to the roof trusses, there is a violation of the Ontario Building Code, a consequent violation of the structural integrity of the building. The Code is a minimum standard with reference to load-bearing and no other standard can be accepted. He continued saying, roof trusses should not be cut and that is conceded by the Program's witness. Therefore, we have an indication of the importance of roof trusses and the seriousness of the deficiency.

Mr. Austin argues there are no defects proven which possibly bring the appellant's claims within the relevant section of the Act and Regulations. He points out the decks have been in use by the owners for five years and there is no evidence of collapse. The fireplaces are still in use and have not made the building or units uninhabitable for the purpose for which they were intended.

To assist us in our consideration of the claim, we have had the benefit, apart from the testimony of the witnesses, of the reports of the inspector Mr. Haskett (Exhibit 9) and the report of K-W Home Inspections Inc. (Exhibit 10). In neither of these documents does the Tribunal find evidence of a major structural defect. The decks, in our view, are not an integral part of the building. The roof trusses have given the inspectors no indication there is any evidence of possible collapse. The building has been used by the occupants since 1989 without incident except for minor inconvenience.

The onus is on the appellants to persuade this Tribunal there is a major structural defect within the meaning of the Act and, in our view, there is clearly not sufficient evidence to support these claims.

Therefore, by virtue of the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

DALE WEBB
LINDA WEBB

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding

APPEARANCES:

DALE AND LINDA WEBB, appearing on their own behalf

NETANUS T. RUTHERFORD, representing the Ontario New
Home Warranty Program

DATE OF

HEARING: 31 October 1994 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by the Applicants from a decision of the Ontario New Home Warranty Program set out in a decision letter dated July 3, 1992. The decision states that the Applicants' home does not qualify for enrolment under the Ontario New Home Warranties Plan Act as there was no "builder" who fit the definition prescribed by the Act. Section 1(a) of the Act specifies:

"builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed house whether for the purpose of sale by the person or under a contract with a vendor or owner.

As well, the home was said not to conform to the definition in the Act under section 1(d) which states:

"home" means,
(a) a self-contained one-family dwelling,
detached or attached to one or more others
by common wall.

The threshold question for the Tribunal is whether the Act applies in the circumstances of this case. For that reason, the Tribunal ruled that a decision will be given on that question before proceeding with the warranty claim. Another consideration is that the Program has not conducted an inspection of the alleged deficiencies and has made no decision with respect to them.

The Agreement of Purchase and Sale between the Applicants and the vendor, Loukar Homes Inc., was signed on July 16, 1991. Page 2 of the attached Schedule to the Agreement specifies that the Applicants were to provide all plumbing work including fixtures, all electrical work including fixtures, all heating and cooling systems, any painting including exterior or any materials, and no sod.

The Applicants testified that they were not only assured by the vendor that their home was enrolled in the Program and qualified for coverage under the Act but Schedule "C" to the Agreement of Purchase and Sale lists those circumstances where warranty coverage does not apply. One exclusion is "defects in materials, design and workmanship supplied by the owner". As well, Schedule "D" specifies that any item installed by the purchasers' own supplier will not be covered by the Program.

The Applicants insisted that because of the exclusions in the Act and the Agreement, it was their understanding that everything else would qualify for warranty coverage. In other words, only those items which they or their supplier provided would be excluded from coverage but not the entire home.

Mr. Johnston, a conciliator with the Program, testified concerning the procedure for a vendor registering with the Program which may be done before obtaining a building permit. However, a home can not be properly enrolled under the Act if it does not meet the definition of a "home" under the Act. Mr. Johnston testified that although it was unfortunate that the home in question was enrolled in error by the vendor, this could not govern warranty entitlement which is based on compliance with the Act.

Mr. Johnston explained that greater precautions are now taken by the Program prior to enrolling homes. For example, there are now more on site inspections of homes to monitor compliance with the Act.

Counsel for the Program provided a good explanation for the apparent contradiction between the definition of "builder" under the Act as a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home and the warranty coverage exclusions contained in section 13(2) of the Act. She took the position that there must be a distinction between "essential" items, such as heating, plumbing and electrical work and "non-essential" items.

The practice of the Program is that the performance of relatively small amounts of work or the supply of relatively small amounts of material by the owner or some third party is not

sufficient to vitiate the warranty. The general rule of thumb applied by the Program is that the undertaking of the builder must include plumbing, heating and electrical work and materials.

The Tribunal finds that the Applicants' claim does not fit within the parameters of the Act which has very strict requirements for eligibility. Although the Tribunal sympathizes with the Applicants and their situation, it is not able to extend the ambit of the legislation beyond that which the drafters intended it to apply.

To succeed in their claim, the Applicants must establish that they are covered by the warranty provided in section 13 of the Act and are therefore entitled to compensation under section 14. To do this, they must fit the definition of "owner" in section 1(g) of the Act and Loukar Homes Inc. must satisfy the definition of "vendor" found in section 1(n) of the Act. The definitions in question are:

- (g) "owner" means a person who first acquires a home from its vendor for occupancy, and his successors in title;
- (n) "vendor" means a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under contract with an owner.

The Applicants qualify as "owners" on the facts, provided that Loukar Homes Inc. qualifies as a "vendor". However, in the circumstances of this case, the Tribunal finds that Loukar Homes Inc. is not a "vendor", according to the definition found in the Act. The Agreement of Purchase and Sale was not really for the sale of a completed home but rather, it outlined the various obligations of the two parties. This problem arises in every case where the vendor enters into a contract to sell a home to be built, which explains the addition of the last clause to the definition "and includes a builder who constructs a home under a contract with the owner". In order to apply this provision, Loukar Homes Inc. must fit the definition of "builder" found in the Act.

The Tribunal finds that the obligations of the Applicants pursuant to the terms of the Agreement of Purchase and Sale, both as to work performed and materials supplied, were so extensive that Loukar Homes Inc. can not be said to be a builder who undertook all of the work and supplied all of the material to construct a completed home. Not only does Loukar Homes Inc. not meet the definition of "builder" in the Act but the house in question does not meet the requirements for a "home" under the Act, if one excludes the work and materials supplied by the Applicants.

It may be that the vendor misunderstood or misrepresented the coverage offered by the Program but he was not doing so in his capacity as an authorized representative of the Program or as a lawyer representing the interests of the Applicants. It would be wise for the Applicants to seek the advice of a lawyer as to whether there are any civil remedies available to them in this situation.

In John W. Crate (1991) 22 CRAT 604, the Tribunal ruled in similar circumstances where the vendor did not provide such services as plumbing, heating and electrical work, that the contribution by the Applicant, both as to the work performed and the material supplied, was so extensive that the vendor did not qualify as a "builder" under the Act. The Tribunal pointed out that in the same way as failure to enrol a home or pay the fee on the part of a vendor does not deprive a purchaser of coverage if otherwise entitled, so too, the enrolment of an unqualified home does not render the Program liable.

This case is regrettable in that a program which is routinely referred to as one offering consumer protection failed in its goal and as a result, great hardship and distress was caused to the Applicants. It is to be hoped that more extensive monitoring and on site inspections on the part of the Program will decrease the possibility that such circumstances will be repeated.

Accordingly, by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim of the Applicants.

WENTWORTH CONDOMINIUM CORPORATION NO. 132

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
SELWYN CHARLES, Member
HANS G. KEPPLER, Member

APPEARANCES:
DAVID STEWART, representing the Applicant

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF 13 December 1993;
HEARING: 25, 26 January 1994 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Ontario New Home Warranty Program set out in a decision letter from the Program to the Applicant dated July 25, 1991 and found at tab 23 of Exhibit 5. We are concerned here with claims by the Condominium Corporation for deficiencies in common elements of a condominium apartment building known as "Florentine Place" built at 99 Donn Avenue in Stoney Creek, Ontario by a developer/builder Nestex Development Limited. The Declaration was registered in the Land Registry office in Hamilton on February 17, 1989 so the times limited in the Ontario New Home Warranties Plan Act for the making of claims upon the Program began to run from that date. A number of defects were reported to the Program with which it dealt in various ways. In the final decision letter, seven items remained outstanding and these were the items with which we dealt at this hearing. These are listed in the letter as follows:

- Item 1 - Carpet throughout the building
- 2 - Vinyl tile installation on the basement floor
- 3 - Fire alarm deficiencies
- 4 - Ramp heater snow melting equipment
- 5 - Line fence not installed properly

- 6 - Internal repairs due to water penetration in units
- 7 - Garage wall leak

At the conclusion of the hearing, counsel for the Applicant advised that the Applicant was not pursuing further claims nos. 4 and 5 listed.

The first witness for the Applicant was Mr. Joseph Cooper of Cooper's Draperies and Carpets, the installer of the carpet in the halls of the building. The carpet was manufactured by Kraus Carpet Mills Limited of Waterloo. Mr. Cooper said that his firm installed the carpet on the seven floors of the building in good order. After several months, the Condominium Corporation complained about the carpet being streaked. As a result, a conciliation meeting was held on September 19, 1990, and about that time, some photographs were taken which are Exhibits 7A, B, C and D herein which show this "streaking". As a result of this conciliation and further inspections by representatives of the manufacturer, it was agreed that the manufacturer would replace the carpet on the worst three floors being the first, fifth and sixth. The carpet was then replaced on the fifth floor, but instead of replacing on the first and sixth floors, they took some of the best pieces which came up from the fifth floor and used them to replace the worst parts on the other two. Exhibits 8A, B and C are photographs taken recently which show some of these pieces which were patched in this way. Mr. Cooper also referred to the fact that there was a complaint made of excessive oil being used in the manufacture of the carpet which had caused it to become discoloured.

On cross-examination, he confirmed that the initial complaint was only about the streaking. He said that the new carpet used on the fifth floor was a different type of carpet which was accepted by the Condominium Corporation Board and that in his opinion, all of the carpet in the building should have been replaced in the same manner.

The next witness was Mr. Webb, the principal in a company, Property Management Guild, which was engaged by the Condominium Corporation to manage the building. On the issue of the carpets, he referred to the position of the Program as the matter developed. At the beginning we have the reference to the item in Schedule "A" attached to the report to the Condominium Corporation by the Program of the conciliation meeting held on September 19, 1990 which reads as follows:

An inspection of the carpeting throughout the corridors of the 7 floors revealed that

the carpet has an unacceptable stain or die color variation and is unacceptable in quality of material. The Builder is to assist the board in dealing with the carpet manufacturer to replace the effected carpet. The carpet replacement shall be completed by November 14, 1990.

Next we have a letter from the Program to the builder on November 19, 1990 in which it is stated:

Item # 12 - The carpet issue is not resolved to date and it appears that some assumptions have been made by the Board which I will clarify. The intent of item # 12 on the conciliation report dated September 20, 1990 was to identify that there is an unacceptable "stain of die colour variation" in some of the carpet throughout the building. Only the affected carpet was to be replaced or cleaned to remove the stains. The Warranty Program did not specifically identify the locations because at the time of the conciliation, Mr. Peter Web of The Management Guild had indicated that Kraus Carpet Mills were investigating the cause of the stains and may clean all floors, if floors # 1, 5 and 6 could be corrected.

As stated in the conciliation report and verified by our inspection of November 12, 1990, the builder is responsible for assisting the board in having the manufacturer replace the affected carpet if the cleaning method does not work. Any offers by the manufacturer to clean or alter the other areas is not a warranty matter. At this time, unless the board can prove that all the carpet in the building is not an acceptable carpet having the proper certification for high rise corridor application, the program will consider the quality of the carpet to be acceptable.

(see tab 15 of Exhibit 5)

Finally, we have the decision letter aforementioned in which the Program states:

Item #1 - CARPET THROUGHOUT THE BUILDING. This item was inspected and conciliated on September 20, 1990. The Builder was requested in the conciliation report, to assist the Board in having the carpet in the building inspected by the manufacturer Kraus Carpet Mills Ltd. At the time of the conciliation the Board had been dealing with the carpet representative Mr. Gary Gemus in having the problem resolved. A meeting was held with the installer and an agreement was made to correct the situation. This information was not presented to the Program at the time of the conciliation meeting of September 20, 1990. The Program's decision on the quality of the carpet was "there was a stain that should be removed." The question of the quality of the carpet would be determined after the carpet manufacturer had tested a sample of the carpet. This was agreed to by the Board in a letter from Kraus, dated September 4, 1990. The Board also agreed to pay a usage fee to the installer. This was later denied by the Property Manager, Mr. Ian Kirk. The Program later assisted the Builder in following the recommendation of the carpet manufacturer and had the builder expedite the repairs as recommended. This work was found to be acceptable by the Program.

The manufacturer has informed the Board through Mr. Kirk that the carpet met the construction specifications for 99 Donn Avenue, and that "the soiling concerns were caused by a scouring process that failed to remove all loom oils used in manufacturing". It was stated that the cleaning process would correct the problem and the Board agreed that would be acceptable. To date, the Board has not contacted the installer to have the work completed, nor has the Board informed the Builder or the Program of the outcome of the testing. The Board had a meeting with the carpet installer on March 25, 1991, without informing the Program or the Builder and agreed to have the carpets cleaned for a cost of 50/50 of the original \$228.00. The Builder has agreed to pay the cost of \$114.00 for the remaining six floors to settle this matter. It is the final decision of the Program that the settlement offered by the manufacturer to the Board is a reasonable solution to the carpet deficiencies and the Builder's payment of the cleaning is his final responsibility to the Board.

(see tab 23 of Exhibit 5)

Mr. Webb felt that the Applicant's claim regarding the carpet was a fair one.

Coming to the claims concerning the vinyl tile in the basement floor, Mr. Webb said that there are bumps and dips in the floor and it appeared to him that the floor was not prepared

properly for the tiles. Concerning the claim of deficiencies in the fire alarm system, he said that they had it checked by Serv-Alarm Service and Maintenance Company Limited and its report is the last document in tab 15 of Exhibit 5. It is stated in this report that there are a number of deficiencies in this system.

On cross-examination, Mr. Webb said that he thought the suggestion of Kraus Carpet Mills Limited concerning the usage fee for the carpets was reasonable. He said the reason that the Condominium Corporation did not pay it was because they understood that by doing so they would bring the work into the category of work done by the owner which would have the result of taking the whole item out of the warranty coverage. However, he admitted that they never checked this point with the Program.

The next witness was David Fairhurst, a resident of the building and one of the Directors of the Condominium Corporation. On the issue of the garage wall leaking, he said water continues to leak through it through expansion joints. He said that just a week before his testimony, he saw water pouring in and running down the wall during a rain storm.

For the defence, the first witness was Mr. Jerry Cumming, the conciliator from the Program who dealt with these claims and has worked with the Program for a number of years in dealing with condominium corporation claims for deficiencies in common elements. With regard to the carpet, Mr. Cumming said that the lines in the carpet of which the Applicant complained as streaks were part of the pattern and he saw nothing wrong with them. The first time Mr. Cumming saw the carpet was on May 1, 1990 when he attended a meeting at the building. At that time, he saw the brown stains in patches on the carpets caused by the oil which had not been properly removed. It is important to note that this was beyond the one year from the registration of the Condominium Corporation. All that was reported within the year by way of complaint concerning the carpets was the streaking.

Mr. Cumming referred next to the conciliation meeting held on September 19, 1990, at which he was one of the persons present and to the conclusions reached as set out in the reference to this item in Schedule "A" to the letter of September 20 found at tab 9 of Exhibit 5 which we have quoted above, and he finally referred to the position reached by the Program by November 19, 1990 set out in his letter at tab 15 of Exhibit 5 which we have also quoted above.

Concerning the complaint as to the vinyl tile in the basement, Mr. Cumming referred to the conclusions reached at the

conciliation meeting as set out in Schedule "A" of the report being:

An inspection of the basement corridor revealed that the vinyl tile installed in the corridor and access to exit corridors has been installed over an un-prepared concrete floor base. This board shall mark each tile which has cracked due to debris under the tile. The builder shall remove the identified tile, prepare the concrete surface and install new matching tile. The tile work shall be completed by October 26, 1990.

The final position of the Program on the vinyl tile issue is to be found in its decision letter in which is stated:

Item #2 - VINYL TILE INSTALLATION ON THE BASEMENT FLOOR. The Builder originally installed carpet in the basement corridors. This material was substituted by the Builder after the building was registered at the request of the Board of Directors because the original "as built" drawings provided by the Builder specified vinyl tile. The Board was not satisfied with the installation. The Program, the Builder and the Board marked the cracked tile and the builder replaced 241 tiles. This repair was inspected by the Program and found to be acceptable. The Builder has informed the Program that the repairs were accepted by Mr. Fountain, in writing, November 28, 1990. Since that time, the Builder has reported to the Program that the Board has not maintained the temperature levels in the basement corridors during the winter months which would cause further delamination of the tile bond to the concrete base. The colour of the tile and the high gloss wax finish exaggerate the minor irregularity of the appearance of the tile surface. It is the final decision of the Program that the installation and the repair to the floor by the Builder is within the industry standards.

With regard to the fire alarm deficiency, Mr. Cumming said that by July 25, 1991, this had been corrected and all that remained to be done was regular maintenance which was the responsibility of the Applicant. With regard to the complaint of water entering the building, Mr. Cumming said his final observations and information was that these defects were repaired. He said that he would consider this complaint still warrantable, but no one had called him about any such claim.

The next witness was Mr. Tony Gaultieri, the general

foreman for the builder, who had 18 years experience in this business. Dealing with the carpet, he said that, at one point, he believed they had an agreement that Kraus Carpets would replace the carpet on floors 1, 5 and 6 and that the Condominium Corporation would pay one-half of the usage fees discussed and the builder would pay the other half. This fell through because the Condominium Corporation later refused to pay anything. He criticized the Condominium Corporation for lack of co-operation on this issue. With regard to the garage leaks, he said the builder had repaired all of these leaks brought to its attention.

The Program called as a witness Mr. Carmen Di Battista whose firm installed the fire alarm system. He said that when they got the copy of the Serv-Alarm Company's report (last document in tab 15 of Exhibit 5), he went to the premises with a representative of the builder and inspected each item mentioned. He said that they checked all of the switches and found them to be in order and in accordance with the Building Code. He said that in some cases where Serv-Alarm specified that a different switch or part should have been used, the fact was that the one installed was exactly the same, but supplied by a different manufacturer.

Upon this issue of the fire alarm system, the Tribunal prefers the evidence of Mr. Di Battista to that presented on behalf of the Applicants. He appeared to us to be a competent and qualified expert in his field who gave his evidence in a straightforward and credible manner and he was not shaken in any of it by cross-examination. Opposed to this, we have only the written report of Serv-Alarm without the benefit of hearing its witness or his being subject to cross-examination and we see no reason to reject any of the evidence of Mr. Di Battista and, therefore, we accept the same and find that the fire alarm system as completed by his company was without defects in workmanship or material and installed in accordance with the Ontario Building Code.

The final witness for the Program was Mr. Gary Gemus, the Regional Sales Manager of Kraus Carpet Mills who has been in this industry for 20 years. He said that the problem with the carpet was caused by an oil used in one stage of its manufacture which should later be removed and, in this case, was not properly removed. This was what caused the blotches and the brown soil spots. He said the streaking of which the Condominium Corporation initially complained was not a defect and was part of the pattern of the carpet. He referred to a letter he wrote on September 4, 1990, following a meeting at the building with Peter Webb and some Board Members. He stated that they saw the carpet "was not performing" from an appearance/retention point of view. They

agreed that Kraus would replace floors 1, 5 and 6 with a different carpet and take a piece of the replaced carpet and test it for soiling and cleanability and if it could be cleaned, they would clean the rest of the floors. It was agreed the Condominium Corporation would pay \$229.82 per floor as a usage fee. The experiment in cleaning showed that the carpet could be cleaned with a deep steam process. Kraus then offered to clean all of the remaining carpet and proposed that it would split a usage fee of \$229 per floor with the Condominium Corporation. However, the latter refused to pay any part of the usage fee. Mr. Gemus said that maintenance alone for the two years gone by would have cost it more than \$115 per floor. He gave one other interesting piece of evidence, namely, that Kraus had issued a credit to have the three floors replaced and so it appears that someone obtained the benefit of this without replacing the carpet on the first and sixth floors. This is not, however, an issue with which we are concerned.

The Tribunal must now reach its conclusions upon each of the issues. To succeed, the Applicant Condominium Corporation must bring its claims within section 13(1)(a) of the Act:

13.(1) Every vendor of a home warrants to the owner,

(a) that the home

- (i) is constructed in a workmanlike manner and is free from defects in material,
- (ii) is fit for habitation, and
- (iii) is constructed in accordance with the Ontario Building Code;

The first claim concerns the carpet throughout the building. The Tribunal finds that the streaking of which the initial complaint was made was not a defect in either workmanship or material. The discoloration and blotching caused by the residue of oil was such a defect, but no report of this was made to the Program within the year as required.

Section 13(4) of the Act provides:

- (4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes

effect, or such longer time under such conditions as are prescribed.

Section 4(1) of Ontario Regulation 892 made pursuant to the Act provides:

4.(1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation.

No notice in writing or indeed otherwise of any claim as to this oil left in the carpets or as to its effects on the appearance of the same was made as required by these provisions and this claim, therefore, fails on this ground.

The second claim is as to the vinyl tile insulation on the basement floor. The Tribunal finds that the vendor/builder in replacing some 241 tiles did remedy all of those which constituted defects within the meaning of section 14(1)(a) of the Act. There remain some small differences in the level of some of the others, but these are so slight as not to cause them to crack and can only be noticed if one looks very closely. In the Tribunal's view, these are not of sufficient consequence to constitute defective workmanship. We concur with the Program's finding that the repairs to this floor are within industry standards.

The third claim concerns the fire alarm deficiencies. We have already indicated in dealing with the evidence of Mr. Di Battista that we find the system as completed was without defects in workmanship and materials and installed in accordance with the Ontario Building Code.

The fourth claim concerning the ramp heater was withdrawn at the close of the hearing.

The fifth claim concerning the line fence was also withdrawn at the close of the hearing.

The sixth claim as to internal repairs due to water penetration was not reported within the one year as required and this Tribunal must agree with the Program's denial of it on this basis.

The seventh claim concerns the garage wall leaks. The strongest evidence of the Applicant on this issue was that of Mr. Fairhurst whose evidence we have noted above. The problem which

the Applicant faces here is that the only leaks in the garage wall reported within the two years limited for this purpose were leaks at or near the northeast corner. While the Applicant complained of other leaks later, these were not reported within the two years required. It was not established by the Applicant that the leaks of which Mr. Fairhurst testified were those reported within the two years and not properly repaired. Therefore, the Applicant has failed to establish this claim.

Accordingly by virtue of the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow these claims.

S.W.J. WICKS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, Presiding

APPEARANCES:

S.J.W. WICKS, appearing on his own behalf

MAY CHENG, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 2 September 1993

Toronto

REASONS FOR DECISION AND ORDER

Mr. Wicks appeals a decision by the Ontario New Home Warranty Program to deny him compensation for cracks in the foundation that are admitted by the Program to constitute a major structural defect.

In its decision dated 22 April 1992, the Program denied Mr. Wicks' claim on the basis that it was excluded under subsection 13(2) of the Ontario New Home Warranties Plan Act (the "Act"). This subsection excludes warranty coverage on defects in materials, design and workmanship supplied by the owner.

The facts are as follows:

Mr. Wicks purchased a modular home from Modular Homes of Primrose Limited ("Primrose") under an Agreement of Purchase and Sale dated 20 March 1990. The Certificate of Possession shows 26 September 1990 as the date of possession.

Although the Agreement of Purchase and Sale does not make explicit which party is responsible for backfilling, Mr. Wicks testified that he did the backfilling at the back and sides of the house. With the assistance of a private contractor, Mr. Wicks used materials in existence on his property to produce about "60 truckloads" of backfill.

Mr. Wicks further testified that Primrose poured the garage foundation only; according to Mr. Wicks, he did not have the money at the time of possession to put up the garage. Mr. Wicks testified that he again provided the backfill around the garage.

During the first year of possession, a conciliation report dated August 20, 1991, was prepared by the Program detailing the repair of certain cracks found to be warrantable. Other cracks were considered by the Program to be ineligible for warranty coverage, for example, because such cracks were caused by shrinkage. These decisions are not in dispute here.

However, what is in dispute is the warrantability of certain cracks, with no water infiltration, that were first reported to the Program by Mr. Wicks on February 25, 1992. Upon inspection for a major structural defect, the Program reported two diagonal hairline cracks in the poured concrete foundation at each of the north corners of the dwelling. Additionally, two cracks were observed on the top of the garage foundation wall, which is 6 feet north of the dwelling, on the west elevation, and two other cracks were observed on the top of the wall at the east elevation. These cracks vary in width from about 1/4" to 3/8".

The Program does not dispute that these cracks do constitute a major structural defect. However, what is disputed is the cause of the cracking. Mr. Wicks admits that he does not understand the cause of the cracking nor what steps he can take to remedy the problem and prevent further cracking.

The Program takes the position that the cracking is caused by Mr. Wick's failure to provide adequate frost protection around the perimeter of the garage foundation.

In the view of the Program, inadequate frost protection around the garage foundation is significant because both the dwelling and the garage foundation were poured as one continuous concrete foundation. According to the Program, the upward heaving action of frost under this monolithic foundation caused not only cracks in the garage foundation, but also lateral pushing against the dwelling's foundation, which in turn caused it to crack.

The Program representative testified that the exposed garage foundation - the garage is not yet built - makes it particularly vulnerable to frost damage. Furthermore, in its decision letter, the Program found that about 28" of backfill around the garage foundation, supplied by Mr. Wicks, was providing frost protection in a geographical area that commonly has frost to a depth of 4 feet below grade. Additionally, the surface grading around the perimeter of the garage, in the Program's view, was insufficient to prevent accumulation of surface runoff from

entering the excavation. The resulting conditions of frost and freezing created, in the words of the Program, "an upward heaving action [that] significantly displaced the garage foundation wall causing the concrete to crack".

A similar opinion as to the cause of the upward heaving action, and thus foundation cracking, was voiced in a letter to the Program dated April 15, 1992. In this letter, Grey-Bruce Construction Limited, which according to testimony was hired by the builder, found that "the garage walls and possibly the footings have heaved due to insufficient backfill and poor grading directing water towards the wall instead of away". An additional factor was the "insufficient frost protection" of about 34" to the bottom of the footings.

What must be kept in mind is that the Applicant must put forward some evidence of the existence of a major structural defect that is not excluded under section 13(2) of the Act. In this case, the Applicant has not done so.

By his own testimony, Mr. Wicks confirms that he supplied the backfill around the garage and much of the dwelling. For his own reasons, he choose to delay the construction of a garage structure, leaving the garage foundation exposed for a number of winters.

Furthermore, Mr. Wicks did not dispute that frost protection around the garage foundation was inadequate. He simply asserted that he was unable to provide the necessary backfill to a depth sufficient to provide adequate frost protection. Finally, he did not dispute that the dwelling and garage foundation were a continuous concrete pour.

Under these circumstances, the Program's explanation for the foundation cracking is reasonable and accepted by this Tribunal. As such, this case clearly falls under section 13(2) of the Act. Thus, warranty coverage is excluded for this major structural defect, admitted to exist, because it is reasonable to conclude that the cracks in the foundation that form the subject of this appeal were caused by "defects in materials, design and work supplied by the owner", Mr. Wicks.

Therefore, by virtue of the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, this Tribunal upholds the decision of the Ontario New Home Warranty Program to disallow the Applicant's claim.

MR. AND MRS. STEPHEN WOOD

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES:

MR. AND MRS. STEPHEN WOOD,
appearing on their own behalf

NETANUS RUTHERFORD, counsel appearing on
behalf of the Ontario New Home Warranty Program

DATE OF
HEARING:

29 October 1993

Toronto

REASONS FOR DECISION AND ORDER

Mr. Stephen Wood and Mrs. Donna Wood appeal a decision by the Ontario New Home Warranty Program to deny them compensation for a window substitution. All other disputed matters, as noted in the Program's decision letter of July 15, 1992, were settled by the parties at the outset of this hearing.

What remains in dispute is whether the admitted substitution by the builder of a differently-sized window over the garage constitutes a breach of the Ontario New Home Warranties Plan Act (the "Act").

It is agreed that the Woods expected their builder to install a Palladian window by Loewen that measured 8'0" X 3'4" in the unfinished space above the garage. Entered into evidence were the right elevation plans for the Woods' home, which show a window measuring 8'0" X 3'4", in the space above the garage.

According to Mr. Wood's testimony, the window that was installed and still remains is a Palladian window by Loewen that measures 8'6" X 5'11". Pictures were entered into evidence showing the current window extending from the floor to some inches above the attic beam, in the space above the garage.

Within one year of the date of possession, being October 1, 1990, through a letter dated January 21, 1991, the Woods complained to the Program that the "Palladian window in room over garage is the wrong size. It is physically too large to fit in the

finished room and must be replaced with the size specified in the plan". A conciliation meeting was conducted on October 2, 1991.

In its decision letter, the Program took the position that no compensation was payable because the window substitution did not violate any of the warranties under section 13(1)(a) of the Act or the warranty under Part VI of Regulation 892 concerning substitutions.

The warranty requiring compliance with the Ontario Building Code was not at issue. Both the Program's representative and Mr. Wood agreed in testimony that the window in its present condition was apparently free from Building Code infractions. As well, the Program's representative stated his opinion that the substituted window met the single family residence requirements respecting safety features for windows.

However, the parties disagreed as to whether there had been breaches of both the warranty for workmanlike construction and the warranty requiring substitutions to be of equal or better quality.

The Program took the position that the window had been installed in a good and workmanlike manner. As well, the Program regarded the window as free from defects in material, with the exception of a defect to the crank roto-operating cover of the south casement. This defect, according to the Program, can be repaired at nominal cost and the Program agreed at the hearing to do so.

The Woods argued that the builder's failure to install the window as set out in the plan constituted a breach of the vendor's warranty to construct the home in a "workmanlike manner", as required under section 13(1)(a)(i) of the Act.

They relied upon the Febbrini case heard by this Tribunal on November 5, 1991, in which the Tribunal found the Applicants to be entitled to compensation. The Tribunal stated at page 642 that:

The failure of the builder to construct a stairway in accordance with the floor plans and pursuant to his undertaking to do so constitutes a failure of the builder to construct in a workmanlike manner. The fact that the stairway may satisfy the requirements of the Ontario Building Code does not free either the New Home Warranty Program or the builder of liability.

With respect, this case can be distinguished from the

facts here. In Febbrini, the builder's failure to construct the stairway according to plan resulted in a stairwell so narrow that it was virtually unusable to transfer the usual furniture, including beds, from the main floor to the floor where the bedrooms were located. This particular failure of the builder significantly and detrimentally affected the basic function of the construct, unlike the circumstances presented here.

The basic functionality of the substituted window leads me to find no breach of the warranty requiring workmanlike construction. However, this functionality is relevant in considering the applicability of the warranty under Part VI of Regulation 892 that requires substitutions to be of equal or better quality.

The first issue is whether section 18(1) or section 19 of Part VI of Regulation 892 applies.

The Woods argued that section 18(1) applies because the window was an "item of construction or finishing for which the purchaser is entitled to make selection pursuant to the purchase agreement". This section prohibits the vendor from making a substitution without the written consent of the purchaser, which was not obtained from the Woods. Without the proper written consent, the issue of whether the substitution was of equal or greater quality does not arise, if section 18(1) applies.

Upon review of the agreement between the parties, I agree with counsel for the Program that section 18(1) does not apply. Schedule "C" to the Agreement details over 70 items of construction and finishing. Many of these items are specifically subject to the Purchasers' approval, for example, "style and colour of ceramic tile [for whirlpool area] to be chosen by Purchaser from Builder's samples". Other items are specified "per plans" or "to code".

Respecting the window specifications, section 28 of Schedule "C" to the Agreement states that: "All casement Loewen windows with screens and grilles [to be] as indicated on plans". Section 28 does not make the selection of the windows specifically subject to the purchasers' approval, in clear contrast to many other items on the Schedule.

In my view, the agreement between the parties is sufficiently clear to find that the window selection more properly falls under section 19 of Part VI of Regulation 892. This section applies where the "item ... is referred to in the purchase agreement ... [and] is not an item that is to be selected by the purchaser". Thus, the issue of proper consent by the purchasers does not arise.

What remains to be decided is whether the substituted window is of equal or better quality than the window referred to in section 28 of Schedule "C" to the Agreement.

Mr. Wood in testimony admits that the substituted window is of equal or better monetary value than the window specified in the Schedule. There is no dispute that the substituted window is by the same manufacturer and is considerably larger. However, the Woods argue that equivalent "quality", as demanded by the legislation, does not solely mean equivalent monetary value. I agree.

The Woods take the position that the substituted window is not of equal or better "quality" because it is neither as pleasing aesthetically to them nor as safe as the window illustrated in the plans. As well, they argue that the finishing of the "future bonus room" in which the floor-to-ceiling window is located is now much more difficult.

They rely on the Laudone case heard by this Tribunal in April 1991, in which the applicant was found to be entitled to compensation for window substitutions. In that case, the Tribunal considered both the functionality and cost of the substituted windows. Functionality - in that case, the R value of the windows - was found to be greater and cost was found to be less than the windows specified in the contract. The Tribunal applied the [then] section 21 and determined that the substituted windows were of at least equal quality. The applicant was also refunded the difference in cost between the less expensive windows, which were substituted, and the specified windows.

In my view, however, both the Laudone and Febbrini cases support the Program's position. Both cases suggest that the functionality of the substituted item must be considered in an assessment of whether the substituted item is of equal or better quality than the specified item.

Upon a consideration of the functionality of the substituted window, I find that it still functions as a window, albeit in a less pleasing way to the Woods. The aesthetics that result from the substitution are not warrantied under the Act. Furthermore, the Woods presented no persuasive evidence that the function of the substituted window, in comparison with the specified window, was significantly and detrimentally affected. Whether the substituted window was less safe or made finishing the future bonus room more difficult, were, in my view, sincere allegations by the Woods that were not supported by the evidence presented.

In conclusion, I find the builder's substitution of the window did not breach the Act and thus the Applicants are not entitled to compensation as a result of the substitution.

Therefore, by virtue of the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal upholds the decision of the Ontario New Home Warranty Program to disallow the Applicants' claim for compensation resulting from the window substitution.

MR. AND MRS. STEPHEN WOOD

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES:

MR. AND MRS. STEPHEN WOOD,
appearing on their own behalf

NETANUS RUTHERFORD, counsel appearing on
behalf of the Ontario New Home Warranty Program

DATE OF

HEARING: 29 October 1993

Toronto

REASONS FOR DECISION AND ORDER

Mr. Stephen Wood and Mrs. Donna Wood appeal a decision by the Ontario New Home Warranty Program to deny them compensation for a window substitution. All other disputed matters, as noted in the Program's decision letter of July 15, 1992, were settled by the parties at the outset of this hearing.

What remains in dispute is whether the admitted substitution by the builder of a differently-sized window over the garage constitutes a breach of the Ontario New Home Warranties Plan Act (the "Act").

It is agreed that the Woods expected their builder to install a Palladian window by Loewen that measured 8'0" X 3'4" in the unfinished space above the garage. Entered into evidence were the right elevation plans for the Woods' home, which show a window measuring 8'0" X 3'4", in the space above the garage.

According to Mr. Wood's testimony, the window that was installed and still remains is a Palladian window by Loewen that measures 8'6" X 5'11". Pictures were entered into evidence showing the current window extending from the floor to some inches above the attic beam, in the space above the garage.

Within one year of the date of possession, being October 1, 1990, through a letter dated January 21, 1991, the Woods complained to the Program that the "Palladian window in room over garage is the wrong size. It is physically too large to fit in the finished room and must be replaced with the size specified in the plan". A conciliation meeting was conducted on October 2, 1991.

In its decision letter, the Program took the position that no compensation was payable because the window substitution did not violate any of the warranties under section 13(1)(a) of the Act or the warranty under Part VI of Regulation 892 concerning substitutions.

The warranty requiring compliance with the Ontario Building Code was not at issue. Both the Program's representative and Mr. Wood agreed in testimony that the window in its present condition was apparently free from Building Code infractions. As well, the Program's representative stated his opinion that the substituted window met the single family residence requirements respecting safety features for windows.

However, the parties disagreed as to whether there had been breaches of both the warranty for workmanlike construction and the warranty requiring substitutions to be of equal or better quality.

The Program took the position that the window had been installed in a good and workmanlike manner. As well, the Program regarded the window as free from defects in material, with the exception of a defect to the crank roto-operating cover of the south casement. This defect, according to the Program, can be repaired at nominal cost and the Program agreed at the hearing to do so.

The Woods argued that the builder's failure to install the window as set out in the plan constituted a breach of the vendor's warranty to construct the home in a "workmanlike manner", as required under section 13(1)(a)(i) of the Act.

They relied upon the Febbrini case heard by this Tribunal on November 5, 1991, in which the Tribunal found the Applicants to be entitled to compensation. The Tribunal stated at page 642 that:

The failure of the builder to construct a stairway in accordance with the floor plans and pursuant to his undertaking to do so constitutes a failure of the builder to construct in a workmanlike manner. The fact that the stairway may satisfy the requirements of the Ontario Building Code does not free either the New Home Warranty Program or the builder of liability.

With respect, this case can be distinguished from the facts here. In Febbrini, the builder's failure to construct the stairway according to plan resulted in a stairwell so narrow that it was virtually unusable to transfer the usual furniture, including beds, from the main floor to the floor where the bedrooms

were located. This particular failure of the builder significantly and detrimentally affected the basic function of the construct, unlike the circumstances presented here.

The basic functionality of the substituted window leads me to find no breach of the warranty requiring workmanlike construction. However, this functionality is relevant in considering the applicability of the warranty under Part VI of Regulation 892 that requires substitutions to be of equal or better quality.

The first issue is whether section 18(1) or section 19 of Part VI of Regulation 892 applies.

The Woods argued that section 18(1) applies because the window was an "item of construction or finishing for which the purchaser is entitled to make selection pursuant to the purchase agreement". This section prohibits the vendor from making a substitution without the written consent of the purchaser, which was not obtained from the Woods. Without the proper written consent, the issue of whether the substitution was of equal or greater quality does not arise, if section 18(1) applies.

Upon review of the agreement between the parties, I agree with counsel for the Program that section 18(1) does not apply. Schedule "C" to the Agreement details over 70 items of construction and finishing. Many of these items are specifically subject to the Purchasers' approval, for example, "style and colour of ceramic tile [for whirlpool area] to be chosen by Purchaser from Builder's samples". Other items are specified "per plans" or "to code".

Respecting the window specifications, section 28 of Schedule "C" to the Agreement states that: "All casement Loewen windows with screens and grilles [to be] as indicated on plans". Section 28 does not make the selection of the windows specifically subject to the purchasers' approval, in clear contrast to many other items on the Schedule.

In my view, the agreement between the parties is sufficiently clear to find that the window selection more properly falls under section 19 of Part VI of Regulation 892. This section applies where the "item ... is referred to in the purchase agreement ... [and] is not an item that is to be selected by the purchaser". Thus, the issue of proper consent by the purchasers does not arise.

What remains to be decided is whether the substituted window is of equal or better quality than the window referred to in section 28 of Schedule "C" to the Agreement.

Mr. Wood in testimony admits that the substituted window is of equal or better monetary value than the window specified in the

Schedule. There is no dispute that the substituted window is by the same manufacturer and is considerably larger. However, the Woods argue that equivalent "quality", as demanded by the legislation, does not solely mean equivalent monetary value. I agree.

The Woods take the position that the substituted window is not of equal or better "quality" because it is neither as pleasing aesthetically to them nor as safe as the window illustrated in the plans. As well, they argue that the finishing of the "future bonus room" in which the floor-to-ceiling window is located is now much more difficult.

They rely on the Laudone case heard by this Tribunal in April 1991, in which the applicant was found to be entitled to compensation for window substitutions. In that case, the Tribunal considered both the functionality and cost of the substituted windows. Functionality - in that case, the R value of the windows - was found to be greater and cost was found to be less than the windows specified in the contract. The Tribunal applied the [then] section 21 and determined that the substituted windows were of at least equal quality. The applicant was also refunded the difference in cost between the less expensive windows, which were substituted, and the specified windows.

In my view, however, both the Laudone and Febbrini cases support the Program's position. Both cases suggest that the functionality of the substituted item must be considered in an assessment of whether the substituted item is of equal or better quality than the specified item.

Upon a consideration of the functionality of the substituted window, I find that it still functions as a window, albeit in a less pleasing way to the Woods. The aesthetics that result from the substitution are not warrantied under the Act. Furthermore, the Woods presented no persuasive evidence that the function of the substituted window, in comparison with the specified window, was significantly and detrimentally affected. Whether the substituted window was less safe or made finishing the future bonus room more difficult, were, in my view, sincere allegations by the Woods that were not supported by the evidence presented.

In conclusion, I find the builder's substitution of the window did not breach the Act and thus the Applicants are not entitled to compensation as a result of the substitution. Therefore, by virtue of the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal upholds the decision of the Ontario New Home Warranty Program to disallow the Applicants' claim for compensation resulting from the window substitution.

EUGENIO BRUNO

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE REGISTRATION

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding
SUSAN VELLA, Vice-Chair
JOYCE YASINCHUK, Member

APPEARANCES:

CLAUDIO POLSINELLI, representing the Applicant

BEVERLY WISE, representing the Registrar under
the Real Estate and Business Brokers Act

DATE OF

HEARING: 11 May 1994

Toronto

REASONS FOR DECISION AND ORDER

Mr. Bruno appeals the decision of the Registrar under the Real Estate and Business Brokers Act refusing to grant him registration as a real estate salesperson. By proposal dated July 12, 1993, the Registrar refused to grant registration pursuant to section 6(b) of the Act on the grounds that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The parties agree to the following statement of facts:

1. Initially registered as a real estate salesperson from October 30, 1990 to May 2, 1991.
2. Currently registered under Motor Vehicle Dealers Act as a motor vehicle salesperson.
Registered since 1976.
3. Applied for re-instatement under REBBA on April 5, 1993.
4. Disclosed a criminal record.
5. Registrar's office learned of conviction for possession of counterfeit money and sentence of 30 months in prison.
6. History of criminal process:
Date of offence and charge: April 25, 1991
First court date: April 26, 1991
Trial date and guilty plea: September 25, 1991
Sentencing hearing: October 25, 1991
Incarceration: October 25, 1991 - May 12, 1992 (6 months served)
Parole termination: April 24, 1994

7. Facts behind criminal record - Found in possession of 1,026,000 counterfeit U.S. federal reserve notes. Mr. Bruno states he committed offence while under financial pressure and emotional stress resulting from a failed partnership in a motor vehicle dealership and marital problems. He was also registered as a real estate salesperson at the same time.
8. Met with Mr. McKenna, the Acting Registrar, on May 12, 1993 to discuss application.
9. Proposal signed on July 12, 1993.
10. Hearing before tribunal set for May 11, 1994.

Mr. Gordon Randall, the Registrar, testified that even though the Applicant was no longer on parole, he was concerned about the nature of his offence, the seriousness, the recent occurrence of the offence, and that real estate was not a life career for the Applicant. The Applicant was registered as a real estate salesperson in the fall of 1990 and was charged with a serious criminal offence within six months. Mr. Randall discussed the importance of meeting the public's expectation of honesty and integrity in the dealings of real estate practitioners.

Mr. Randall reviewed the Board Members Comment Sheet from the National Parole Board (Exhibit 10) and remarked that it must be evaluated in the context in which it was written; that is, to assess the Applicant's suitability for day parole and not his suitability as a real estate salesperson. He emphasized that the Act was not a punitive piece of legislation but that as part of a regulated industry, real estate practitioners were expected to meet a high standard of conduct. Due to the nature of the industry with its emphasis on commission based earnings, there are many financial pressures and personal stresses. Mr. Randall was of the view that consumers should not be subjected to the risk of a salesperson who was particularly susceptible to these pressures.

Mr. Randall directed the Tribunal to page 6 of Madam Justice Dymond's judgment on October 25, 1991 where she stated when sentencing the Applicant: "You were able to and did obtain over a million dollars of counterfeit U.S. bills. This is a very large amount. The major danger of flooding a country with counterfeit money is the danger to the country itself; this is not merely a danger to an individual in society, it varies tremendously from crimes such as robbery or theft and it is much more serious. For that reason the courts take a very severe view of this offence." Mr. Randall went on to say that the Applicant's crime was more serious because he was not simply an errant teenager but was a thirty-seven year old man.

On cross-examination, Mr. Randall acknowledged that the Applicant appeared to have been forthright and honest when seeking

registration. He explained that he was not suggesting that the Applicant should never be registered as a result of his criminal conviction but that the commission of the offence could only become less critical to any evaluation of his suitability after a longer period of time had elapsed.

A number of character witnesses testified in support of the Applicant's registration; namely Mr. Dave Hepburn, Mr. Joe DeLuca, Mr. Mel DeLisa, and Mr. Nino Spizzirri. Mr. Hepburn, as the owner and president of Woodland Chevrolet & Oldsmobile, hired the Applicant in 1992 as General Sales Manager when he was released from prison. He characterized the Applicant as personable and honest and an employee whom he entrusted with a great deal of financial responsibility.

Mr. Mel DeLisa, the Applicant's parole officer, was impressed with the Applicant's conduct, as was Mr. DeLuca. Mr. Nino Spizzirri, as well, described his confidence in the Applicant and expressed a willingness to act as his sponsoring broker and supervise his activities as a real estate salesperson.

The Applicant testified concerning the financial and emotional difficulties which led to his criminal charge and conviction. He was direct and forthright when relating his account of events.

Counsel for the Registrar argued that less than three weeks had elapsed since the Applicant had ceased to be under the jurisdiction of the courts. She noted the serious nature of the criminal offence and the fairly lengthy sentence of 30 months. Counsel commented that the period of rehabilitation had not been lengthy enough to establish no likelihood of recurrence. She spoke of the Act as a public protection statute such that the remorse of the Applicant should be weighed against the perception of the public about the standards regulating the industry.

Counsel for the Registrar referred the Tribunal to the case of Israel Jakobs 16 CRAT 223, where an Applicant who had disclosed criminal convictions was refused registration as a real estate salesperson. The Tribunal stated:

An overriding principle is that any Applicant must show through a long course of conduct that he or she is a person to be trusted and not unfit to be registered under this Act.

"Integrity and honesty" are not merely words. They are standards that must be met. While the onus is on the Registrar

to show that a person is disentitled under the Act to registration in the circumstances such as those before us, the Applicant must establish that his conduct and character will be unimpeachable and that there are no reasonable grounds for belief that he will not act in accordance with these standards.

It should be noted that Jakobs differs from this case in that the Applicant was still on probation. However, the principles applied to applications for registration should be consistent, while taking into account the individual peculiarities of each application. For example, when reviewing the totality of the Applicant's conduct in this case, there was only a six month period when he worked as a real estate agent. This should be contrasted with a review of the totality of his conduct as a motor vehicle salesperson where he had an eighteen year career.

Counsel for the Registrar also relied on the case of Ronald W. Northover 13 CRAT 292 to reinforce the principle that an important consideration is the question of public perception of the policies which will be followed to regulate the real estate industry. As well, she reviewed the principle as stated in the case of Brenner 19 CRAT 58 that the Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks that the Registrar was in error in concluding that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Counsel for the Applicant claimed that the standards imposed by the Registrar were not reasonable and demanded perfection rather than recognizing that people make mistakes. He insisted that the criminal conviction in question was an isolated incident and reviewed the evidence of the Applicant's parole officer who was of the view that the Applicant would not be charged under the criminal justice system again. He emphasized that the Applicant had a long and successful career in another regulated industry, i.e. as a motor vehicle salesperson. As well, counsel reviewed the evidence of various character witnesses who had positive assessments of the Applicant and are prepared to trust him and work with him.

Counsel for the Applicant expressed his concern for the subjective criteria exercised by the Registrar when reviewing applications for registration. He argued that the Registrar had not given proper weight to the Applicant's forthrightness and successful career in another industry.

Counsel relied on the Guler case 21 CRAT 204 to support his contention that the Registrar was in error and should consider attaching terms and conditions to the registration. Counsel for the Registrar pointed out that since the sponsoring broker was the owner of a REMAX franchise with fifty-eight salespeople, it would be impossible for him to supervise the Applicant to the degree required if terms and conditions were imposed.

This Tribunal is mindful of the admonition in the Brenner case where the Divisional Court comments that the Tribunal was preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed and decided to give him a second chance because there was a possibility that he might, indeed, have reformed himself. While this Tribunal was impressed with the Applicant's sincerity and the strength of the testimony supplied by his various character witnesses, we are bound to focus on the test as outlined in Brenner.

The Tribunal does not find that the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. However, the Tribunal directs the Applicant's attention to section 10 of the Act which reads as follows: "A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

For the present, however, by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the Applicant's registration.

HOWARD BUCKMAN

APPEAL FROM PROPOSALS OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS &
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
A. DONALD MANCHESTER, Member
FRANK HARTWICK, Member

APPEARANCES;

HOWARD BUCKMAN, appearing on his own behalf

ROBERT CONWAY, representing the Registrars under the
Real Estate and Business Brokers Act and
Motor Vehicle Dealers and Salesmen Act

DATES OF

HEARING: 2,3 November 1993

Toronto

REASONS FOR DECISION AND ORDER

The appellant has brought two applications before this Tribunal, one for registration as a real estate salesman and the other for registration as a salesman under the Motor Vehicle Dealers Act. Since it is agreed between the parties that this Tribunal shall hear both applications, the same evidence will therefore apply to both.

The parties have filed an Agreed Statement of Facts which we find necessary to incorporate into this decision:

AGREED STATEMENT OF FACTS

I. JURISDICTION

1. Howard Buckman submitted an application for registration under the *Real Estate and Business Brokers Act* ("REBBA") as a salesperson. That application is dated May 29, 1992.¹ He also submitted an application for registration under the *Motor Vehicle Dealers Act* ("MVDA"). That application was received by the Ministry on October 16, 1992.²

2. The Registrar *REBBA* and the Registrar *MVDA* issued proposals to refuse the respective applications for registration.³ The grounds for refusal in the two Proposals are identical, so the parties have agreed to have Mr. Buckman's appeal against each Proposal heard by one panel of the Commercial Registration Appeal Tribunal ("the Tribunal") consisting of a Vice-Chair of the Tribunal, a *REBBA* representative and an *MVDA* representative.

II. PAST CONDUCT

(a) Disbarment and Criminal Charges

3. Each Proposal alleges that Mr. Buckman's past conduct affords reasonable grounds for the Registrar to believe that Mr. Buckman will not conduct business in accordance with law and with integrity and honesty, and that he cannot reasonably be expected to be financially responsible in the conduct of business. The facts relied on in support of those conclusions are contained in the following paragraphs.

4. From 1972 through to July, 1986 Mr. Buckman was engaged in the private practice of law as an associate, at other times as a partner, and at other times as a sole practitioner. He was engaged primarily in real estate and corporate practice during his last 6 years of practice.

5. On July 14, 1986 Mr. Buckman voluntarily came forward and confessed to representatives of the Law Society of Upper Canada that he had misused a substantial amount of client trust funds. He told the Law Society that he had come forward because he could no longer live with the stress and strain of covering his wrongdoing. He then co-operated fully with the Law Society's investigators.

6. The following summary of Mr. Buckman's misuse of trust funds is taken from the Report of the Law Society Discipline Committee:

Mr. Buckman advised the Law Society that his misconduct commenced in 1982 following a serious loss which he [and his clients] had suffered in relation to ... investments. In order to cover the shortfall incurred, Mr. Buckman resorted to the misuse of his trust funds. The misuse can be categorized under the three headings:

1. bridge loans;
2. mismanagement of a mortgage portfolio including resort to fraudulent and forged documentation, and
3. misappropriation.

1. Bridge Loans

Mr. Buckman would inform certain clients that he was seeking bridge financing for other clients and on this basis clients advanced funds to Mr. Buckman. In some instances, some clients were paid interest in excess of 230% *per annum*. Mr. Buckman kept the funds himself and paid the interest to his clients. ... [The total of the bridge loans obtained was \$823,000. None of the bridge loans was secured.]

2. Mortgage Portfolio

Mr. Buckman also obtained funds which would be secured by a mortgage. To date all of the mortgage documentation reviewed by the Law Society's auditors has proven to be forged and fraudulent mortgages which were manufactured by Mr. Buckman. ... [The total of the funds obtained by fraudulent mortgages was \$844,000.]

3. Misappropriation

In respect of this category, Mr. Buckman obtained funds on a closing of real estate transactions or commercial ventures and did not ultimately pass the closing funds along to his clients. Instead, Mr. Buckman took the funds to cover his own personal shortfall. ... [The total of the misappropriated funds was \$818,500.]

7. The total of all of the funds wrongfully obtained by Mr. Buckman under the 3 categories was estimated at \$2,485,500.00.

8. The Law Society disbarred Mr. Buckman on September 25, 1986.

9. On February 27, 1987, Mr. Buckman pleaded guilty to 37 charges of fraud and to 12 charges of theft over \$1,000.00. He was sentenced to 5 years' imprisonment concurrent on each count. The Court also ordered Mr. Buckman to pay compensation totalling \$2,528,192.00 to 43 victims. A copy of the Reasons for Sentence is at Tab 6 of the Document Brief. The parties request that the Reasons for Sentence be read with this Agreed Statement.

(b) Bankruptcy

10. Mr. Buckman made a voluntary assignment into bankruptcy on July 22, 1986. The claims filed against him totalled \$2,443,394. His assets had an estimated value of \$600,000.

11. Mr. Buckman was discharged from bankruptcy on August 4, 1989.

(c) Restitution

12. At Mr. Buckman's trial in 1987, the Trustee in Bankruptcy testified that there was a realistic possibility of partial restitution to the victims. Mr. Buckman's assets had an estimated value of \$600,000 against claims of \$2.4 million. However, there have been no payments from the bankrupt estate to unsecured creditors. The parties to this Agreed Statement are not able to say why because the Trustee has yet provided an accounting. However, the following information which the Trustee in Bankruptcy gave Mr. Buckman serves as a partial explanation:

- (1) Trustee's fees and legal fees have been approximately \$200,000;
- (2) the realization on assets was less than their estimated value because bankruptcy sales are typically at "fire sale" prices;
- (3) the largest asset, Mr. Buckman's interest in a 125-acre parcel in Whitchurch-Stouffville, has declined in value because of the considerable decrease in the Toronto area real estate market since 1989. It is very difficult to estimate the current value of that asset. Mr. Buckman's own best estimate of the value of his interest is \$200,000 — \$300,000;
- (4) after Mr. Buckman's trial Revenue Canada Taxation gave notice that it intended to treat the misused trust funds as income to Mr. Buckman and to tax him thereon. The tax claimed is in excess of \$250,000. The claim is being litigated by the inspectors of the bankrupt estate.

13. Based on the realization of assets to date, the Trustee in Bankruptcy expects that there will be no payments to unsecured creditors.⁴ It is uncertain whether the unsecured creditors will receive anything from the eventual disposition of the Whitchurch-Stouffville property.

14. 53 claims were submitted to the Law Society Compensation Fund as a result of Mr. Buckman's misuse of trust funds. The claims totalled \$3,059,134.11. The Compensation Fund Committee allowed 30 of the 53 claims in whole or in part. Some claims were ineligible for any grant because there was no solicitor/client relationship between the claimant and Mr. Buckman when the claimant advanced the money to Mr. Buckman. Other claims were allowed only in part because of one or both of the following:

- (1) some lenders voluntarily assumed significant risk when advancing money to Mr. Buckman, as evidenced by the expected high rate of return;
- (2) the loss did not cause the claimant to suffer any financial hardship.

15. The discretionary grants actually made totalled \$566,395.11. That is because at the time the maximum payable from the Fund for losses caused by any one lawyer was \$500,000.00.

16. Mr. Buckman made partial restitution of approximately \$58,000 to 3 victims after his bankruptcy. \$40,000 of that amount was his inheritance from his mother, and the remaining \$18,000 was a wage advance from his employer. Each of those victims had a judgment against Mr. Buckman which survived the bankruptcy.

17. Apart from Mr. Buckman's interest in the Whitchurch-Stouffville property, at present there is no other possibility for partial restitution to the victims and to the Law Society Compensation Fund. Mr. Buckman has not earned sufficient income since his release from prison to make any restitution. His income in 1990 was assessed by Revenue Canada Taxation at \$44,962, and in 1991 it was assessed at \$14,554. His declared income in 1992 was \$30,455. His estimated income for 1993 is \$40,000.

18. Mr. Buckman's primary source of income at present is his consulting company, Renee Consultants Limited. Some of Renee's clients are former victims of Mr. Buckman. Examples of the services rendered by Renee Consultants are:

- (1) a feasibility study on establishing a business in China;
- (2) ejection of a commercial sub-tenant;
- (3) refinanced auto dealer's "floor plan" financing with auto manufacturer;
- (4) co-ordinated "Jobs Ontario" grant for employee training.

Gordon Randall, Registrar under the Real Estate and Business Brokers Act giving evidence in support of his Proposal to refuse registration said there are three issues involved which militate against registering the appellant. They are: past conduct, breaches of trust, fraud and fraudulent documentation.

He pointed to the two and a half million dollar loss as one of the biggest breaches of trust ever experienced. The misconduct, he observed, continued over a period of four years, and was clearly related to real estate since so many mortgage lenders were involved. He said salesmen in the real estate trade although under the supervision of their broker were often on their own in houses with clients and the broker has no direct control during the making of deals. As far as placing conditions on a salesman, he said it was placing the broker in an untenable position and his office simply did not have the personnel to monitor the registrant.

He continued saying that public perception was important in that both the Act and the public presume that the person registered is fit to carry on business honestly.

On cross-examination by Mr. Buckman, he said the time lapse between the offences and registration depended upon the magnitude of the offences and the sentence. In this case, he said the losses could not have been covered by the usual \$5,000 bond. To the question would a substantial bond alter the situation, he answered maybe..

Mr. Frank Karametech, a licensed broker was called by Mr. Buckman. He has operated Delphine Real Estate Limited in Toronto since 1968 and has known the appellant for some 17 years. There had been a lawyer-client relationship between them at one time and Mr. Karametech said Buckman was always available and able to solve his real estate problems. Speaking directly to Mr. Buckman, he said "I felt very bad about it but it does not change my opinion of you. Some of my clients hope you will someday make money to pay them back. I feel you could be an asset to the real estate trade and I would take the responsibility of looking after you and if it required a bigger bond I think we should get it. I'll take the responsibility of probation for a year if necessary." Mr. Karametech concluded by saying he considered Buckman if registered as a salesman would earn somewhere to between \$60,000-\$70,000 a year.

Daniel Missios also called by the appellant said that he owned three restaurants and three lumber yards and had met the appellant in a doughnut shop three years ago. He apparently became interested in Mr. Buckman's welfare and has had him involved in a

Youth Centre in East York. Mr. Missios impressed the Tribunal as a caring and compassionate man although he stated, "I am no bleeding heart. I have felt boards such as this as being too lenient."

The case involving the application for real estate registration having been concluded, Mr. Robert Pierce, Registrar of Motor Vehicle Dealers and Salesmen took the stand. His concerns, he said, were the convictions for fraud and theft, the consequent risk to the public and the breach of trust which continued over a period of years.

Mr. Pierce stated there was a real problem in the industry today in the wholesale side of the business as a result of the recession. Selling cars is the second largest business in Ontario involving over a half million vehicles per year. With regard to wholesalers, he said, side deals with a dealer friend are a problem. He pointed out that the wholesaler buys with his own money and then sells it curbside. The risk to the public is a major issue with restitution being a paramount factor.

On cross-examination, Mr. Pierce was asked if the standards under the Motor Vehicle Dealers Act are less than under the Real Estate and Business Brokers Act. His answer was "No", the main concern in both is the consumer. He pointed out that if a dealer cannot protect the public then the consumer is at risk. He continued, "There is a standard in the industry and we want to uphold it." In dealing with the question of supervision by the brokers, we want to uphold it." In dealing with the question of supervision by the dealer, he said there are numerous cases of falsifying documents and the freedom the salesman has is impossible to control. Addressing Mr. Buckman, he said, "I don't believe in your circumstances Sir, enough control could be put on you. You were on parole for three years and so only two years has elapsed and a number of people have not been paid back. I am not prepared to gauge the length of time required to consider registration."

Mr. Louis Lacasse, a Toronto automobile dealer, giving evidence on behalf of Mr. Buckman, said he has 36 employees with 9 in the showroom and 12 in the service department. He operates a dealership in the European manner where the salesmen are not permitted to have sales contact on the floor. Ninety-nine percent of the deals are approved by me he said, and all contracts require my signature. He has known Mr. Buckman for two years and has engaged him for some Small Claims Court work and also some administrative work. He pointed out that the appellant performed well and honestly and worked hard. Mr. Lacasse would hire Mr. Buckman and observed, "As a wholesaler, I would not permit you to

operate but I would demand written daily reports to me from the floor."

Mr. Buckman giving evidence said he is now 49 years old and as a result of his conviction, his marriage had broken up. He has a daughter aged 19 who is employed and a son seventeen residing with the mother. There is no Court Order requiring him to support the family. Buckman lives with a girlfriend in Thornhill who is employed as an administrative assistant for a food retail company. He contributes \$800 monthly to the expenses.

Although sentenced to five years and a further five years concurrently, Mr. Buckman served only ten months and was assigned to a halfway house in December 1987. On parole he attended a psychiatrist for two years, a condition of his parole, which was completed in February 1992.

He has built up what appears to be a good business known as Renee Consulting Company. He said that he had previously worked for a period with Mr. Lacasse, "who put me in a position of trust in his company".

Mr. Conway in cross-examination asked if the appellant had ever considered applying to the Law Society for re-admission. The reply was that a former Benchet told him that a pardon would be necessary. He admitted that the standard for admission to the real estate trade would not be different from that of the legal profession, but the conditions could be arranged with the Registrar. With regard to the application for registration as an automobile salesman, he said he believes the standard of integrity to be the same as that of Law Society but again control would be different.

In argument, Mr. Conway contended the principal concerns of both Registrars have much in common. Pointing to previous cases, he said the appellant's was "the most aggravated of all". Four years of covering up fraudulent conduct was the single factor which shows the most risk. He referred to the Law Society requirement of good character saying, "What could be more stringent than conducting business with law and with integrity." Nothing has come out of this hearing that should prove the Registrar wrong."

Mr. Buckman in his submissions referred to the humanizing process which is reflected by giving him another opportunity. He admitted that trust is easily lost and it takes a long time to gain it back. The question is how long?

This is one of the most unfortunate cases to come before

this Tribunal. Not only because we are witnessing the dissolution of a career destroyed, but because of the impression left on us by the man who has argued his own defence to these Proposals. Mr. Buckman is a highly intelligent and obviously resourceful individual with all the promise any lawyer may have. To say that he is remorseful is an understatement and he is no doubt correct when he says, "No one paid a greater price than I. My rehabilitation began when I voluntarily made my admissions and with incarceration, parole and psychiatric treatment." He asks, not without some bewilderment, "When does the sentencing of society stop and its belief in the rehabilitation of the offender begin?" That is one of the issues confronting this Tribunal.

It is to Mr. Buckman's credit that some of his victims have given him employment, that several witnesses came here to testify on his behalf even to say they would employ him. He appears to be to some degree financially responsible although it is conceded he cannot pay back many of the victims or satisfy the Compensation Orders and, of course, there is Revenue Canada which has put in its claim for some \$250,000. From the point of view of these staggering obligations, his financial position is untenable. He can, however, earn a reasonable living from his consulting firm if no other demands are made on him.

The grounds for the Proposal of both Registrars are identical.

The applicant is not entitled to registration under section 6 of the Act

- (1) because having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; and
- (2) as the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The section is identical in both the Motor Vehicle Dealers Act and Real Estate and Business Brokers Act, the former being section 5 and the latter section 6. The demands under the Acts are therefore the same.

Mr. Conway in his submissions points to the case law which cannot but be adverse to the appellant's registration. The Michael Delaney case (1984) CRAT 262, the Henry Katz case (1988) CRAT 299, the Gary D. Williamson case (1987) CRAT 266 and the Ruby Richman case (1985) CRAT 212 - all similar to that which is before us today. These cases unanimously support the Proposals of both Registrars. The Ruby Richman case differs only in that conditions were attached to the registration of Richman which, in our view, could not be attached to the registration of the appellant because of the magnitude of the outstanding obligations. Richman was required to prove that he had satisfied all claims within a period of something like a year after which time, he could be registered. But in the event that he had not satisfied these obligations, the Registrar was ordered to carry out his Proposal and refuse registration.

There is also the judgement of the Divisional Court in the matter of Re Richard Brenner CRAT SCO Decisions Vol.19, p.88 which defines section 7(4) of the Motor Vehicle Dealers Act and section 9(4) of the Real Estate and Business Brokers Act. The section reads:

The powers of the Tribunal on the application are set out as follows in s.7(4):

...direct the Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

The Court then stated that the effect of s.7(4) is:

that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty...

Despite the sympathy and the compassion we may feel for the appellant, although he asks for none, only for another opportunity, it is the view of this Tribunal that we are bound by the facts and by the law as a result of which, the applications must fail.

The facts afford us little latitude and when they are applied to the law, there is little discretion that we can be given or which would persuade us to favour these applications. We cannot find the Registrar to be wrong in his view given the substantial nature of the offences and the remaining outstanding claims against Mr. Buckman. We are therefore of the view that we must direct the Registrar on each matter to carry out his Proposal.

There is, however, in favour of the Applicant, the opportunity for a further application for registration under section 10 of the Real Estate and Business Brokers Act when it is clear that his material circumstances have changed.

JOHN CARAS

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding
GURDIAL SINGH FIJI, Member
GARY ZALEPA, Member

APPEARANCES:

JOHN CARAS, appearing on his own behalf

JAMES GIRLING, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF
HEARING:

10 March 1994

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out of a Notice of Proposal issued by the Registrar of Real Estate and Business Brokers on May 1, 1993 to revoke the registration of the Applicant as a real estate broker and a Notice of Further and Other Particulars issued by him on June 22, 1993. Mr. Caras was licensed as a salesperson under the Real Estate and Business Brokers Act from September 25, 1973 to April 10, 1983 working with five different brokers during this period and as a real estate broker under the Act from April 11, 1983 to the present time. From February 3, 1989 to June 6, 1991, he was the controlling shareholder and director and managing broker of Homelife/Linkway Real Estate Services Ltd. This company actually went out of business and closed its doors in February 1991 and from May 15, 1991 to the present time, Mr. Caras has been working as an associate broker at NRS Solid Choice Realty Inc.

In his Proposal, the Registrar gives his reason for the same as being that, in his, the Registrar's, opinion John Caras is not entitled to registration under Section 6 of the Act as:

- (1) the past conduct of Homelife/Linkway and John Caras affords reasonable grounds for belief that they will not carry on business in accordance with law and with integrity and honesty;

- (2) having regard to their current financial position, Homelife/Linkway and John Caras cannot reasonably be expected to be financially responsible;

In his Further Particulars, he alleges in paragraph 13 as follows:

- (13) John Caras made a voluntary assignment in bankruptcy on or about March 31, 1993. He declared liabilities totalling \$127,154.78, and no assets. The discrepancy between Mr. Caras' assets and his liabilities affords additional reasonable grounds for the Registrar to believe that he will not be financially responsible in the conduct of business;

Mr. Caras' problems herein are all related to one real estate transaction. We have no evidence of any other complaint or criticism of his conduct as a registrant under the Act. This transaction involved a residential property at 150 Canlish Rd. in Scarborough which was owned by Mr. and Mrs. Deryck. On January 30, 1990, these owners listed this property for sale with Homelife/Linkway Realty Ltd. on a Multiple Listing Agreement for \$255,000 and agreed to pay the agent a commission of 6% upon any sale or exchange. This listing was to expire on April 30, 1990. On February 26, they signed a Price Change Agreement reducing the price to \$249,000 and on April 2, they reduced it again to \$239,000 and extended the listing to May 31.

On May 25, 1990, an Agreement of Purchase and Sale was signed between Mr. and Mrs. Misir as purchasers and the Derycks as vendors to sell the home for \$228,000 with a \$7,000 deposit and the closing date fixed for September 28, 1990. The "commission clause" in the offer reads:

The UNDERSIGNED accepts the above Offer and agrees with the Listing Broker above named in consideration for his services in procuring the said offer, to pay him on the date above fixed for completion a commission of 3% to Selling Broker of an amount equal to the above mentioned sale price which commission may be deducted from the deposit. The undersigned hereby irrevocably instructs my/our solicitor to pay direct to the Listing Broker any unpaid balance of commission from the proceeds of the sale.

The Multiple Listing Agreement itself provided for a payment of the commission of 6% of the sale price of the property on any sale or exchange.

The deposit of \$7,000 was paid by Mr. and Mrs. Misir to the agent company and was deposited in its firm trust account. The property had been sold through a Multiple Listing and, if the transaction had closed, Homelife/Linkway Realty Ltd. would have had to share the commission with the selling broker as indicated above.

When the time came for closing on September 28, 1990, the purchasers were not able to raise the required balance due on closing and were not able to close. Mr. Deryck, who gave evidence at this hearing, said that he had offered to allow the purchasers to make up their shortfall which was \$10,000 by way of a mortgage, but they did not do this. They simply defaulted upon the closing and, pursuant to the terms of the Agreement of Purchase and Sale, the vendors were entitled to the forfeiture of the deposit. A copy of the Homelife/Linkway Realty Ltd. trust account ledger shows that on the 25th day of May 1990, the sum of \$7,000 was received from Omadat Misir and Vish Misir and placed in trust in a term deposit to the credit of this transaction. The ledger goes on to show that on September 28, 1990, the sum of \$7,241.64 was obtained from the term deposit and placed in the trust account, being the original \$7,000 deposit together with \$241.64 for interest thereon. On the same day, Mr. Caras caused the company to send a cheque for the interest \$241.64 to Mr. and Mrs. Misir as required by its agreement with them and to transfer to its general account the \$7,000 claiming the same as commission earned on the transaction.

Mr. Deryck said that, when the deal did not close he contacted Homelife/Linkway's office to ask for the \$7,000 on two occasions by telephone after November 1990, but he did not get any response from Mr. Caras. He then gave instructions to his solicitors to sue Homelife/Linkway for the \$7,000 and to sue Mr. and Mrs. Misir for damages for breach of contract. On April 8, 1992, Mr. and Mrs. Deryck obtained judgment by default in the Ontario Court (General Division) against Homelife/Linkway Realty Ltd. for \$7,000 and against Mr. and Mrs. Misir for \$34,719.36 and costs. On May 4, 1992, the solicitors for Mr. and Mrs. Deryck wrote to Mr. Caras referring to this judgment and demanding payment from Homelife/Linkway Realty Ltd. within one week. No response was obtained to this letter and on June 22, 1992, the solicitors wrote to the Minister of Consumer and Commercial Relations reporting the whole matter.

The file was referred to Joseph Kavanagh, a Registration Officer with the Ministry who was the first witness at this hearing. He wrote to Mr. Caras on June 29, 1992 enclosing copies

of the documents he had received from Deryck's solicitors, stating that the Ministry required a response in seven days and requiring as well a reconciliation of the corporate trust account and a letter from the bank attesting to the balance thereon also within seven days. Mr. Caras finally responded to this with a telephone call on October 7, 1992. There was nothing in writing as required and on October 8, 1992, Mr. Kavanagh wrote again making a formal request for the same documents and information within seven days thereafter pursuant to Section 13(7) of Ont.Reg.891 of which he attached a copy. On October 19, 1992, Mr. Caras finally replied in writing stating that the money in the trust account was transferred only to the general account on the date fixed for closing as commission payable and saying that the Derycks had received the benefit of the agent's services for which they were paying by getting the claim for the damages for which they obtained judgment against the defaulting purchasers.

Mr. Caras personally made an assignment in bankruptcy on March 31, 1993 from which he has now been discharged; Homelife/Linkway is without assets and no recovery can be made from it so that no part of the \$7,000 can be recovered by the Derycks. It is interesting to note that, in his statement of liabilities in the bankruptcy proceeding, Mr. Caras lists the \$7,000 as a debt owing to Mr. and Mrs. Deryck. On his statement his total liabilities were shown as \$127,154.78 and his assets as zero dollars.

The foregoing are the relevant facts. In this case the evidence of the Registrar, Mr. Randall, in dealing with these facts and the conclusions to be drawn from them is of particular importance. We are concerned here with the application of Section 6(1)(a) and (b) which we quoted at the beginning of these reasons. As has been pointed out by the Tribunal in a number of cases, this legislation gives to the Registrar a certain discretion and requires him to exercise it, and this a discretion of the Registrar, not of this Tribunal. It is not sufficient for us to conclude that we would have exercised the same discretion differently. In order to overrule the Registrar, we have to be satisfied that he was wrong and that he did not have reasonable grounds for his conclusions (see Re: Brenner 19 1971-1989 CRAT p.58):

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

and

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

Mr. Randall began by pointing out that the matter arose in his office because of a consumer complaint and said later that this is a case where the illegal conduct of the Applicant resulted not just in risk to consumers, but rather to an actual loss or damage to them. He said he had found it incomprehensible that Mr. Caras would have removed the money from his trust account in the circumstances in which he did. He said that the practice in the industry does not agree with what was done here. In circumstances such as these, if the broker claims a deposit as commission and the vendor does not agree with this, the broker must keep the money in trust until the dispute has been settled, if necessary, by a court order.

Mr. Randall further stated that he found it offensive that Mr. Caras did not seem to appreciate his duty to hold the trust funds. He referred to the educational courses which all brokers are required to take and pointed out that, in these, it was impressed upon Caras the importance of dealing properly with trust funds and that there is no more serious breach of duty than that of misappropriation of trust funds. Even after Mr. and Mrs. Deryck got the judgement against Homelife/Linkway for the money, he made no effort to get them repaid anything. While the point is not before us for determination, we would think that an application under section 20 of the Bankruptcy Act of Canada might result in an order that the bankruptcy did not discharge this particular debt.

In his defence, Mr. Caras stressed the fact that, pursuant to the wording of the agreement, when he took the money for the company he believed it was properly payable to it by way of commission earned. The problem with this is that this result had not been conceded or determined and, until it is conceded by the vendor, or determined by a Court in his favour, the trustee cannot appropriate the trust fund for himself. On this point, the Tribunal was referred to a decision of Scott J. issued on January 29, 1992, in the Ontario Court (General Division) in the case of TRI-T Group Inc., Applicant and Century 21 Deluca Real Estate Ltd. and the Royal Bank of Canada, Respondents, in which an Agreement of Purchase and Sale provided:

"The undersigned accepts the above Offer and agrees with the Listing Broker above named in consideration for his services in procuring the said Offer, to pay him on the date above fixed for completion, a commission of five % of an amount equal to the above mentioned sale price, which commission may be deducted from the deposit. I hereby irrevocably instruct my Solicitor to pay direct to the said Listing Broker any unpaid balance of commission from the proceeds of the sale."

The transaction did not close and an agreement was signed between the vendor and the purchaser whereby the sale was at an end and the vendor was to get the deposit plus an additional sum. The agent refused to release the deposit and the vendor brought the application against the agent and the bank which held the deposit. The Court held that the vendor was entitled to the money. At page 7 of the Judgment as issued, Scott J. says:

In other words, at least in the circumstances here, the beneficiaries of the trust are the vendor and/or the purchaser, and, the agent cannot touch the deposit in order to pay his commission if any, since the deal did not close without default. If he did, it would be conversion.

In a recent appeal from this Tribunal to the Divisional Court in a Judgment issued on February 7, 1994, in the case of Joseph H. Vogelsberg, the Divisional Court criticised the Tribunal for not making the essential findings required of it and overruling the Registrar without meeting the test laid down in the Brenner case. This Judgement contains the follows:

The Tribunal did not make a finding as to whether or not the impugned activities were in contravention of the Act or the regulations. Furthermore, and more importantly, the Tribunal did not make a determination as to whether or not the past conduct of the respondent afforded reasonable grounds for belief that the respondent would not carry on business in accordance with law and with integrity and honesty. With respect, we are of the view that the legislation required that both determinations be made.

And "as the Court said in the Brenner case, unless the

Tribunal can find that his conduct does not afford such reasonable grounds, the Tribunal should not order the Registrar to refrain from carrying out his proposal."

Upon all of the evidence, and applying the principles of law to which we have referred, the Tribunal must reach the conclusion that it cannot find the Registrar wrong and that it cannot say there are not reasonable grounds for his conclusions that the past conduct of the Applicant leads him to believe he will not carry on business in accordance with law and with honesty and integrity.

On the issue of the Registrar's conclusion that the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business, we also could not say that the Registrar is wrong. While his case is not as strong here as on the other point, the fact of the bankruptcy with over \$127,000 in debt and no assets whatsoever and the way in which he dealt with his responsibility with regard to the \$7,000 in trust funds does not inspire confidence in this area.

Accordingly, pursuant to the authority vested in it by section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar of Real Estate and Business Brokers to carry out his Proposal.

CENTURY 21 PENTAGON REALTY LTD.
AND
GAETAN SICOTTE

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATIONS

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding
GURDIAL SINGH FIJI, Member
MAURICE LAMOND, Member

APPEARANCES:
STEPHEN HOROWITZ, counsel, representing the Applicants
ROBERT CONWAY, counsel, representing the Registrar
under the Real Estate and Business Brokers Act

DATE OF
HEARING: 19 October 1993 Ottawa

REASONS FOR DECISION AND ORDER

Century 21 Pentagon Realty Ltd. ("Century 21 Pentagon") and its sole officer and shareholder, Mr. Gaetan Sicotte, appeal a decision by the Registrar to revoke their registrations as real estate brokers.

In a Proposal dated 29 July 1992, the Registrar relied upon section 6 of the Real Estate and Business Brokers Act (the "Act"), alleging that it is reasonable to conclude that both registrants will neither carry on business in accordance with law and with integrity and honesty, nor be financially responsible in the conduct of business.

The parties submitted into evidence an Agreed Statement of Facts.

Briefly, Mr. Sicotte, a long-time registrant under the Act since 1966, operates Century 21 Pentagon, which employs 37 salespersons and 5 support staff.

In September 1991, the Registrar received a complaint that Century 21 Pentagon wrongfully withheld a \$10,000 residential real estate deposit. By letter dated October 1, 1991, the Registrar required written confirmation within 10 days that the deposit had

been paid in accordance with the terms of the release between the purchaser and vendor or that the deposit had been paid into court. By October 31, 1991, Century 21 Pentagon was paid \$3000 commission and all three parties executed a release.

As a result of the above complaint, the Registrar caused a surprise inspection of the books and records of Century 21 Pentagon in March 1992.

This inspection disclosed that the trust account of Century 21 Pentagon was short \$82,927.18 as of March 19, 1992. The inspection also disclosed that there were 25 breaches of trust, involving some 50 transactions, between November 1991 and the date of inspection. It is noteworthy that by late February 1992, the trust account shortage had reached a high of over \$100,000.00, a fact unknown to Mr. Sicotte, according to his testimony.

Additionally, the March 1992 inspection disclosed that Mr. Sicotte had failed to comply with written instructions issued by the Registrar in May 1988 to maintain adequate records.

On March 23, 1992, the Registrar obtained a freeze order against the trust account of Century 21 Pentagon. On April 7, 1992, Mr. Sicotte replenished the trust account with the proceeds of a personal loan. On September 22, 1992, the freeze order was lifted upon terms and conditions, with which Mr. Sicotte has complied.

In November 1992, Mr. Sicotte and Century 21 Pentagon were charged with breaches of trust under the Act and Mr. Sicotte was fined \$10,000, which has been paid.

Counsel for the Applicants argues that the following factors should be viewed as mitigating the consequences of the Applicants' admitted defalcations and failure to maintain trust records and to release a consumer deposit:

- 1) Mr. Sicotte co-operated with the Registrar following the consumer complaint about the deposit and during the subsequent inspection of March 1992 and the investigation.
- 2) Mr. Sicotte testified that the breaches of trust occurred as a result of one-time only problems with cash flow and that he attempted to sell some of his assets in order to resolve the cash flow problems. Mr. Sicotte stated that he knew such defalcations were wrong. He admitted that his actions put the public at risk and states that the trust accounting problems will not reoccur.

- 3) Mr. Sicotte repaid the trust account promptly. It is argued that this evidenced Mr. Sicotte's financial wherewithal, as did his ability to continue operating the business during the duration of the freeze order.
- 4) The commissions earned by Century 21 Pentagon exceeded the amounts withdrawn improperly from trust, resulting in no complaints or financial loss to the public.
- 5) Mr. Sicotte complied with all terms and conditions imposed by the Registrar after the March 1992 inspection; he further stated that he is prepared to continue to abide by any terms and conditions imposed by the Registrar or this Tribunal. His trust accounting has been overseen by a Chartered Accountant, Ms. Celine Tessier, who testified that she is prepared to continue such monitoring.
- 6) No apparent complaints by the public against Mr. Sicotte have been received by the Registrar during Mr. Sicotte's lengthy registration in the real estate field. Additionally, two witnesses, one a long-time registered real estate broker and the other a long-time client, testified on behalf of Mr. Sicotte as to his character.
- 7) The employees of Century 21 Pentagon may suffer detrimental effect if both Applicants lose their licenses.

Additionally, counsel on behalf of the Applicants argued that the Registrar is not exercising discretion if revocation of license is the automatic response of the Registrar to wilful breaches of trust.

In response, counsel for the Registrar argued that there were insufficient mitigating factors here, given the gravity of the Applicants' conduct. Revocation was thus the appropriate response, in the view of the Registrar.

We agree. We too view the misappropriation of trust funds to be a most serious offense that under the circumstances here is completely unacceptable. We adopt the language used in the Sinopoli case, decided by this Tribunal on September 16, 1993, wherein, it is stated at page 8:

Certainly any broker against whom an allegation of misappropriation of trust funds is established has a high test to meet if he is to convince this Tribunal that the Registrar is wrong in the conclusion he reached here [being revocation].

The Applicants before us do not meet this high test. This test is undoubtedly high because of the inherent gravity of conduct in committing breaches of trust against the public. However, the individual circumstances of each case must be assessed reasonably.

Upon such an assessment, we find the facts of prompt restitution, co-operation with the Registrar and no financial loss to the public are mitigating factors.

However, we agree with the Registrar that the fact that no financial loss was suffered by the public may have been more good luck than good management. Risk of harm to the public remains a significant factor, even in the absence of actual harm to the public. Again, to quote the Sinopoli decision at page 8:

If nothing ever went wrong with real estate transactions after an offer is signed and a deposit paid, there would be no need to put these monies in trust at all to the limit of the commission payable.

But these are trust funds and the Act requires their proper management as such.

So far as Mr. Sicotte's compliance with the terms and conditions imposed by the Registrar after the March 1992 inspection, nothing less was expected. However, such compliance does not persuade us of the continuing suitability of conditions for retention of license.

This Tribunal is disturbed that Mr. Sicotte apparently turned to his trust funds without diligently exhausting evidently other financial resources to meet his cash flow problems; these problems he admitted under cross-examination were caused by "nothing special". We also note Mr. Sicotte's testimony that he turned a blind eye to the high level of trust fund shortages and that he "hoped" these shortages would not have continued over a long period of time, absent the surprise inspection.

In this Tribunal's view, Mr. Sicotte's conduct as a whole

has evidenced a cavalier attitude towards the public and the regulator. We agree that the Registrar has reasonable grounds to believe that Mr. Sicotte will not carry on business in accordance with law and with honesty and integrity.

So far as the corporate Applicant is concerned, the past conduct of its sole officer and shareholder - its directing mind - Mr. Sicotte - also affords reasonable grounds for the belief that its business will not be carried on in accordance with law and with honesty and integrity.

The Tribunal is sympathetic to the position of the employees of Century 21 Pentagon, who may be detrimentally affected by the revocation of both Applicants' licenses.

However, the Tribunal is mindful of its primary function, which is to protect the public. We adopt the statement of the Tribunal in the Giovanni Giannini case, 14 CRAT 179:

The primary function of the Tribunal is to protect the public whose members are entitled to the assurance that this regulated industry will be carried on by strictly honest men and women whom they may look to for advice and honest counsel in the course of business with complete confidence.

The real estate industry is one in which major transactions involving large sums, often sums representing people's life savings, are involved.

Therefore, by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act, the Registrar is directed to carry out his Proposal.

JOHN P. CRONE

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
MAURICE LAMOND, Member

APPEARANCES;

SHELLEY FLAM, representing the Applicant

ALVIN TORBIN, representing the Registrar under the
Real Estate and Business Brokers Act

DATES OF 23, 24, 25 February;
HEARING: 1 March 1994

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out of a Proposal of the Registrar of Real Estate and Business Brokers issued on August 30, 1993, to refuse the registration of the Applicant as a salesman under the Real Estate and Business Brokers Act and out of a Notice of Further or Other Particulars dated January 13, 1994. The Registrar's refusal is based upon his opinion that the Applicant is not entitled to registration under Section 6 of the Act because:

- (1) having regard to the Applicant's financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business; and
- (2) the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The Applicant is 49 years of age and has been involved in the selling of real estate since 1980. He was registered under the Act as a salesperson from December 10, 1980 to March 9, 1986 during which time he was employed by four different brokers. He was registered as a broker from March 10, 1986 to March 10, 1992 on which date his registration lapsed. Except for the conduct on his part of which complaint is made by the Registrar in these

proceedings, which took place while he was the registered broker with his own company, Homelife Beach Real Estate Ltd., there were no complaints made against him and no criticisms of his conduct.

In 1987, Mr. Crone incorporated his own company in which he was the principal shareholder and director and the sole directing mind, Homelife Beach Real Estate Ltd. and on March 16 of that year commenced to operate its business which he continued to do until he closed the business on or about October 5, 1990 (see Exhibit 10 the Director's Certificate). For a period of time he and his company were quite successful. In the good years before the fall in the real estate market, the company was doing 500 transactions a year and he was personally handling 40 - 50 transactions a year.

Mr. Crone's problems with the Registrar flow completely from certain actions on his part in dealing with trust funds of this company. It was his evidence that he had been taught by brokers for whom he had worked as a salesperson that a proper way of handling deposit monies which were paid to brokers in trust, pending the closing or other disposition of a transaction, and upon which monies it was required to obtain interest during this interval, was to receive these monies by cash or certified cheque payable to the broker, deposit the same in the broker's trust account, transfer the same amount to the broker's general account, from there use the money to purchase an interest bearing term deposit with the same bank, take the term deposit in the name of the broker in trust for the named beneficiary, and when the transaction closed, cash the term deposit, pay the interest earned to the beneficiary and disburse the principal as appropriate by way of commission to the broker and otherwise, if a surplus, to the vendor as part of the purchase price. It appears that this practice was developed some years ago when difficulty was encountered in getting the bank to pay interest on trust accounts and upon these trust funds.

Mr. Crone described at some length difficulties which he had with his bank, the Royal Bank of Canada. Some of these arose from the fact that his company made its actual deposits and did its business with a local branch which did not have facilities for doing certain of the business required. This was done at a second branch or commercial centre and certain of the record keeping and monitoring was done at yet a third location so he had to deal with people at three different locations of the bank.

Whatever may have been the reasons for the development of the practice described above in the first place, it must be noted that Mr. Crone did not ask his bank to have the term deposits purchased directly with the money from the trust account and no explanation was offered as to why the bank would put the money into

the term deposits from one current account on its books, namely the general account, but not from another, namely the trust account.

In any event with the fall in the real estate market, Homelife Beach Real Estate Ltd. got into serious financial trouble, Mr. Crone liquidated his assets and put several hundred thousand dollars into the company and went substantially into debt personally for this purpose, but to no avail and, as aforementioned, he closed the company in 1990 and on January 20, 1992 personally made an Assignment in Bankruptcy, having at that time \$296,339.10 in liabilities and no assets. He was discharged from bankruptcy on April 29, 1993.

In the meantime, someone telephoned the Ministry or the Registrar's office in 1990 with a complaint about either Mr. Crone or the company, as a result of which an inspector from the Ministry of Consumer and Commercial Relations, Mr. Antonacci was detailed to investigate. He made a report on November 19, 1990 (see Exhibit 36) which indicated very serious breaches as to the maintenance of the trust account and listed a number of these in detail. As a result of this in June 1991, an investigator with the Ministry, Mr. Brian Prendergast, made investigations into the whole matter, examining the company's books and records and getting certain information from the Royal Bank, at the conclusion of which he charged Mr. Crone and Homelife Beach with 15 counts of breach of trust under Section 20 of the Act.

Mr. Prendergast gave evidence at the hearing and said that every one of these counts concerned a real estate transaction in which deposit monies were withdrawn from the trust account by the broker before it or he was entitled to do so because there had not yet been a closing or other final disposition of the transaction. Details of each of these 15 alleged breaches of trust are set out in Exhibit 14 being a copy of the Information in the Provincial Court. The total of the amounts involved in all of the transactions was approximately \$158,000.

In thirteen of these counts, the transactions closed as intended and no loss occurred to anyone as a result of what was done. In counts 11 and 15, losses did occur, \$5,000 in the case of count 11 and \$2,000 in the case of count 15. Mr. Crone made restitution of this \$7,000 on the date of the Provincial Court trial July 8, 1992 and pleaded guilty to these two counts. The Crown withdrew the other 13 counts. The Court fined Mr. Crone \$10,000 with time to pay, one-half in six months and one-half in twelve months. Mr. Crone had no money to pay and got one extension and applied for another which was refused. At the present time, nothing has been paid upon these fines and the whole amount is overdue.

In addition to the evidence concerning the fifteen transactions which were the subject matter of these charges, there was another transaction of concern to the Registrar which was not the subject of a charge because apparently the laying of a charge based upon it was barred by a statutory limitation. This was a transaction in which Mr. and Mrs. Heldman listed a property at 3352 Lakeshore Rd. West in Oakville with Homelife Beach for sale. Prospective purchasers made an offer for the same and put up a \$10,000 deposit to be held by the agent in trust. The purchasers defaulted upon the offer and forfeited the deposit which the broker was then required to pay to the Heldmans which it did not do. In an action in the Supreme Court of Ontario on June 20, 1990, the Heldmans obtained judgment against Homelife Beach for the \$10,000 plus pre-judgment interest of \$609.86. None of this has been paid although it appears probable that the Heldmans may eventually recover up to \$9,000 from two bonds of \$5,000 each posted by Homelife Beach and by Mr. Crone personally.

The question which the Tribunal must answer in dealing with Section 6(1)(b) of the Act is whether it considers the Registrar was right or wrong in his conclusion that this past conduct of the Applicant affords reasonable grounds for his belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. It will be most convenient to review the evidence which we have of such past conduct in respect of four different things.

1. The conduct of the Applicant in connection with the Agreement of Purchase and Sale from Lloyd and Sztuba to Bower (count 11 in Exhibit 14).
2. The conduct of the Applicant in connection with the Agreement of Purchase and Sale from Scanlan to Rutherford (count 15 in Exhibit 14).
3. The conduct of the Applicant in connection with the aborted Heldman transaction aforementioned.
4. The conduct of the Applicant in handling trust funds generally with particular regard to the practice which he said he followed to invest them in term deposits as outlined above, and to the 13 other transactions in which the charges were withdrawn and to the findings of the inspector and the investigator from the Ministry.

Before looking at the evidence in detail to answer this question, it will be useful to re-state the benchmark or benchmarks the Tribunal should use in this exercise. These are set out specifically in the case of Re Brenner (1983) 19 CRAT 58 at p.60 in which the Divisional Court on appeal from this Tribunal stated that:

We are all of the view that the Tribunal appears to have applied the wrong test in determining whether the proposal made by the Registrar should have been carried out.

.....
The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

It is important to understand that clauses (a) and (b) of subsection (1) of Section 6 of the Act, unlike clause (d) thereof give to the Registrar a discretion in determining upon which side of the line the Applicant falls. It is also important to understand that the discretion is given to the Registrar and not to the Tribunal. It is not sufficient for the Tribunal to conclude that it would have exercised the discretion differently. In order to reverse the Registrar's decision, the Tribunal must be able to say that the Registrar was in error in his conclusion and that the past conduct with which we are concerned does not afford reasonable grounds for such a belief. With these considerations in mind, we should review the evidence on the four matters set out above:

1. The Lloyd/Sztuka sale to Bower

We begin with an Agreement of Purchase and Sale signed on June 5, 1990 to purchase a condominium at 1666 Queen Street East, Toronto for \$170,000 upon which a deposit of \$5,000 which Mr. Crone said he received by way of a certified cheque payable to his company Homelife Beach. There is some conflict in the evidence as to what happened to these trust monies. It was Mr. Crone's testimony that he followed the practice outlined above by putting the cheque into trust, then transferred the \$5,000 to his general account, immediately purchasing therefrom a term deposit for \$5,000 and upon the face of the certificate for the same there being stated that it was held by Homelife Beach in trust for the purchaser Bower. He said that the money was still in this certificate when he closed the business of Homelife Beach and such was his state of anxiety at the time that he did nothing further about it with the result that when the term deposit matured, the bank followed its practice of putting the money into the general account of Homelife Beach (from which it had come to purchase the term deposit) and then taken it upon indebtedness of that company to the bank. When asked why he had not put the bank on specific notice that these were trust funds and must go the beneficiary named, he said he was in too great a state of agitation at the time and he did not do anything like that.

On the other hand, Mr. Prendergast stated that he investigated the matter and could find no evidence that this \$5,000 had ever gone into a term deposit. It is true that in another matter he admitted that he missed the \$35,000 additional deposit and that his investigation might have lacked fairness in some respects and that there may not have been sufficient time to turn up this evidence, but on the other hand some doubt has to be cast upon Mr. Crone's evidence by reason of the fact that on July 8, 1992, he signed an Agreed Statement of Facts in the Provincial Court, Exhibit 9, containing paragraph 12 on page 4 which reads:

12. An investigation of the Lloyd and Sztuka to Bower transaction revealed that the deposit in this transaction was not held in trust as is required under section 20(1) of the Act. The deposit was wrongfully withdrawn by Crone to fund a number of cheques written by him in connection with other real estate transactions within the first four days of Homelife Beach having received the deposit from Mr. Bower.

There is no reference whatever in this statement to these funds ever being in a term deposit with the name of the beneficiary

of the trust stated on the face of the Certificate. We shall have more to say about this point when we come to the fourth and last matter listed above for consideration. In any event, Mr. Crone pleaded guilty in the Provincial Court to count 11 in the Information that he did fail to keep these monies in trust as required by the Act and he cannot now deny this fact in these proceedings. He did make restitution of the \$5,000 on the day of the Provincial Court trial that the monies were misappropriated from June 1990 on the evidence of Mr. Prendergast and the agreed Statement or from August 1990 (on Mr. Crone's evidence) until July 1992 and the restitution was undoubtedly made then in order to avoid a more serious penalty from the Provincial Court.

2. The Scanlan sale to Rutherford

We begin here with an Agreement of Purchase and Sale signed on September 19, 1990 to purchase a house in Pickering for \$215,000 and upon which a deposit of \$2,000 was paid. The evidence of Mr. Crone was that this was received by way of a certified cheque and deposited in the Homelife Beach trust account. There is no evidence that these monies went into a term deposit in trust. The transaction did not close and finally it was agreed among all parties that the \$2,000 should be returned to the purchasers, the Rutherfords, by a document signed by all three of the purchasers, the vendors and the agent on October 24 and 26, 1990 (see Exhibit 34). Mr. Crone signed the document on behalf of the agent and issued a cheque on his trust account for the \$2,000 payable to the Rutherfords. It was returned to them by his bank for insufficient funds.

It was Mr. Crone's evidence that he had had trouble with the bank over this \$2,000. He said he put it into his trust account and the bank took it out. When he found out it had done this, he demanded it be replaced and the bank replaced it. He said he believed it was in the account when he wrote the cheque and only learned later that it was not and that the cheque was dishonoured. However, when asked if, when he found this out, he immediately went after the bank to replace it at once as being trust funds, he said that he did not. He did refer to a copy of a trust account statement as of September 12, 1990, which showed a sum of \$2,000 out by way of a returned item and back in the same day, August 21, by way of a reversal of a cheque. We do not have any later statements to show whether such a sum was again taken out by the bank and what was the situation when Mr. Crone issued the cheque in late October which was dishonoured. It is not absolutely clear when the Rutherfords first became entitled to the return of this money, but it is clear that they were so entitled by October 26, 1990 and that they did not get it until the restitution was made on July 8, 1992 concerning which we have commented above.

Also, as in the first case, Mr. Crone pleaded guilty to count 15 in the Information thus admitting that he failed to keep the monies in trust as required by the Act and he cannot now deny this fact in these proceedings.

3. The Heldman Transaction

No charges were laid in connection with this one. We were told that this was because to do so was barred by a statutory time limitation. In this transaction, Mr. and Mrs. Heldman, the parents of a real estate salesperson employed by Homelife Beach listed a property which they owned in Oakville for sale with that company. An offer was received from purchasers who put up a \$10,000 deposit in trust with Homelife Beach. The purchasers were not able to raise the money to close and the vendor took a number of steps to try and assist them which are not relevant to any issue with which we have to deal. In the final result, the purchasers failed to close in circumstances where the deposit was forfeited and the Heldmans were entitled to the same as against them. The Heldmans demanded payment of this sum from Homelife Beach and when it was not forthcoming sued that company and obtained a judgement as aforementioned. None of this money has been paid although the evidence indicated as aforementioned that there may be some recovery upon the bonds posted.

4. The practice followed by the Applicant in purchasing term deposits from his general account

The Applicant explained clearly and fully the practice which he followed and why he did so and said that he honestly believed that what he was doing was acceptable and proper. We have outlined his practice above and need not repeat it here. The Tribunal has three difficulties with his evidence on this point, two of a factual and one of a legal nature.

In the first place, no explanation was offered as to why it was necessary to transfer the money from the trust to the general account to purchase term deposits. The Applicant gave evidence that he was taught by other brokers some years ago to do it this way. One can speculate that such a practice arose in the first place because of rules followed by the banks regarding payment of interest on current accounts and upon trust accounts. However, even if such a practice may have had some justification at one time, it is difficult to believe that such was the case in the late 1980's. In any event, Mr. Crone did not question the bank and seek to purchase the term deposits directly from the trust account as should have been done.

Mr. Crone's second factual difficulty with this evidence is that there is not enough evidence that he followed even this

flawed practice in dealing with these trust funds. There is no evidence whatever that the \$10,000 deposited for the Heldmans was ever put into a term deposit. He did produce two certificates of deposit for 1987 and 1988 which were issued before the period of the difficulties with which we are concerned here, but none since and Mr. Prendergast said that his investigations into these transactions which formed the subject matter of the fifteen charges did not disclose evidence of any such investment in these cases.

Finally the third and the legal problem is that, even if he had followed the practice and documented everything very carefully and made certain that it was stated on the face of every certificate that these were trust funds held for a named beneficiary, **prima facie** it constituted a breach of Section 20 of the Real Estate and Business Brokers Act.

In every one of the four transactions or set of transactions which we have examined, the Tribunal must find that the Applicant either himself or through Homelife Beach of which he was the sole directing mind, acted in breach of Section 20 of the Act. His pleas of guilty upon the criminal or quasi-criminal charges of breach of trust in connection with the Lloyd and Sztuka and the Rutherford transactions render it not open to him to deny this fact in these proceedings.

In the Heldman transaction, there is a Judgement against him by the beneficiaries for trust monies which could only be payable to them if there was a breach of trust. We might comment that as far as we have the facts of this matter, it might have been found, on the wording of the relevant documents, that the agent was entitled to its commission and, therefore, to receive the \$10,000, but if this were so, it should have put forward this defence in that action. We cannot speculate upon this and must take the Judgement of the Court as we find it. Also, while the onus of proving his case never shifts from the Registrar, in circumstances such as we have here regarding the Heldman transaction, where the Registrar proves a broker received a deposit in trust and that that deposit was not paid over to a beneficiary of the trust when demanded, it is not enough for the broker to show that, on the evidence, there could have been valid reasons for his actions. He must show on the evidence what actually happened and that his conduct was valid. We have already commented that the practice described by the Applicant himself in dealing with the large number of transactions was **prima facie** in breach of the Act.

Upon these findings, the Tribunal cannot come to a conclusion that the Registrar was wrong in his conclusions. We are not unmindful of the argument put forward on his behalf that we should have some sympathy with Mr. Crone who was very active in the business for many years and never had a single complaint or problem apart from those of which complaint was made here, who made valiant

efforts to save to his business and help everyone in it to the extent that he lost everything he had and became bankrupt. However, the authorities are clear that we must not base a decision upon sympathy and we must be concerned with past conduct and not with stated future intentions. Also it must be noted that, while he received no other complaints, we are dealing here not with an isolated instance, but a pattern of wrongdoing evidenced and proved in three transactions and probably the case in at least thirteen others.

The Divisional Court dealt with this question recently in an appeal from this Tribunal in the case of Joseph H. Vogelsberg in which it reversed the decision of this Tribunal. Beginning on the second page of his Reasons for Judgement, Saunders J. says:

We wish to draw attention, in particular, to a statement by the Tribunal to the effect that the respondent, in interfering with his trust account, did not commit an act of theft, but anticipated the commissions he would receive on the transactions he genuinely believed would close, and which in fact did close. The Tribunal noted that none of his clients were hurt by his conduct. We consider such an approach to be a serious error. Interfering with a trust account is a wrongful act and the fact that no one was hurt makes no difference. In the decision of the Supreme Court of Canada in Theroux v. The Queen (1993), 79 C.C.C. (3d) 449, Madam Justice McLachlin said at page 465:

The trial judge found that the appellant deliberately lied to his customers, by means of verbal misrepresentations, a certificate of participation in the insurance scheme, and brochures, advising that the scheme protected all deposits. The lies were told in order to induce potential customers to enter into contracts for the homes the appellant was selling and to induce them to give him their money as deposits on the purchase of these homes. The trial judge also found that the appellant knew at the time he made these falsehoods that the insurance for the deposits was not in place. Finally, he found that the appellant genuinely believed that the homes would be built and hence that there was no risk to the depositors. "No risk" used in this

sense is the equivalent of saying the appellant believed the risk would not materialize.

Applying the principles discussed above, these findings establish that the appellant was guilty of fraud. The actus reus of the offence is clearly established. The appellant committed deliberate falsehoods. Those falsehoods caused or gave rise to deprivation. First, the depositors did not get the insurance protection they were told they would get. That, in itself, is a deprivation sufficient to establish the actus reus fraud. Secondly, the money they gave to the appellant's company was put at risk, a risk which in most cases materialized. Again, this suffices to establish deprivation.

The mens rea too is established. The appellant told the depositors they had insurance protection when he knew that they did not have that protection. He knew this to be false. He knew that by this act he was depriving the depositors of something they thought they had, insurance protection. It may also be inferred from his possession of this knowledge that the appellant knew that he was placing the depositors' money at risk. That established, his mens rea is proved. The fact that he sincerely believed that in the end the houses would be built and that the risk would not materialize cannot save him.

The Registrar also relied herein upon the provisions of section 6(1)(a) of the Act. In view of our conclusions above, it is unnecessary to deal with this issue.

Therefore, by reason of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

DON RAYMOND DOBRIJEVIC
(EXCELSIOR REALTY GROUP LTD.)

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATIONS

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chair, presiding
DAVID APPEL, Vice-Chair as Member
JAMES CATHCART, Member

APPEARANCES:
WENDY LINDEN, representing the Applicant
ROBERT CONWAY, representing the Registrar under the
Real Estate and Business Brokers Act

DATES OF HEARING: 18 February and 23 June 1993 Toronto

REASONS FOR DECISION AND ORDER

In this matter the Registrar of Real Estate and Business Brokers proposes to revoke the registration of Excelsior Realty Group Ltd., a company owned and operated by Don Raymond Dobrijevic and to refuse the registration of the said Don Raymond Dobrijevic as a real estate broker.

The Registrar's allegations are consistent with the evidence which has been adduced before this Tribunal and they are as follows. His grounds for the refusal and revocation are:

- (a) having regard to his financial position, he cannot reasonably be expected to be financially responsible in the conduct of its business;
- (b) the past conduct of Raymond Dobrijevic affords reasonable grounds for belief that his business will not be carried on in accordance with law and with integrity and honesty;

- (c) Raymond Dobrijevic is carrying on activities that are in contravention of this act or the regulations.

The same reasons apply, of course, to the company.

The particulars are as follows:

1. Raymond Dobrijevic applied for registration as a real estate broker on or about July 20, 1992 to be employed by Excelsior Realty Group Ltd. Mr. Dobrijevic signed the application as president of Excelsior Realty Group Ltd.
2. Excelsior Realty Group Ltd. was registered as a corporate real estate broker (registration #2174232). Its registration expired on February 2, 1992.
3. Raymond Dobrijevic was registered as a real estate broker (registration #1624022). His registration was terminated on February 2, 1992 with the expiration of Raymond Dobrijevic's registration. Mr. Dobrijevic did not transfer to another registered real estate broker within 60 days, as set out in subsection 13(15), O.Reg. 291/80.
4. Mr. Dobrijevic is not currently registered as a real estate broker.
5. Excelsior Realty Group Ltd. applied for registration as a real estate broker on February 6, 1992. The application identified Mr. Dobrijevic as the holder of 100% of the equity shares and as the sole officer and director of Excelsior Realty Group Ltd. Mr. Dobrijevic signed the application on behalf of Excelsior Realty Group.
6. Mr. Dobrijevic submitted, on February 6, 1992, a "Notice of Employee Change" form to transfer employment from Excelsior Realty Group Ltd. to Excelsior Realty Group Ltd.

To the question 9 on the application of February 6, 1992 concerning unpaid judgements, the response on the application was "No", but a Sheriff's Execution Certificate for Excelsior Realty Group as of February 14, 1992 was obtained and this indicated that there was an outstanding judgement in favour of Revenue Canada for \$23,147.81 dated June 4, 1991.

The Registrar had issued on January 22, 1992 a Proposal to revoke the registrations of Mr. Dobrijevic and the company.

Excelsior Realty was the listing broker for the sale of 647 Wellington Road South, London, Ontario and pursuant to an Agreement of Purchase and Sale dated the 30th of January 1990 between 647 Wellington vendor and Royal Indevco Properties Inc. purchaser, Excelsior Realty agreed to hold in trust in an interest bearing account the purchaser's deposit of \$25,000.

The Agreement of Purchase and Sale did not close and 647 Wellington and Royal Indevco Properties Inc. provided on or about April 18, 1991, a mutual Direction to Excelsior Realty to disburse the monies being held by it in trust as follows:

(a) to 647 Wellington Ltd., the sum of \$6,250.00, payable to Sharpe, Inglis, Litwiller in Trust: and

(b) to Royal Indevco Properties Inc. the sum of \$18,750.00, together with accrued interest on the total sum of \$25,000 made payable to Mostyn, Mostyn & Naiman in Trust.

Excelsior Realty has failed to comply with the mutual direction and is in breach of its duties as a trustee to the beneficiaries of the trust.

Pursuant to an inspection by the Registrar, conducted in July 1991, the real estate trust account was examined and it appeared to be short approximately \$25,000 plus accrued interest.

The evidence before this Tribunal completely supports these facts and we are left to consider the reasons for the shortage in the trust account as presented by Mr. Dobrijevic and his reasons for refusal to honour his obligation. The judgment in favour of Revenue Canada incidentally we note was eventually retired by the company and is no longer in issue.

The Offer to Purchase between Royal Indevco Properties Inc. the purchaser, and 647 Wellington contained a clause directing the agent to hold the deposit as follows:

The purchaser and the vendor direct the real estate agent holding the deposit in this transaction to place same in an interest bearing account or term deposit with any accrued interest on the deposit to be paid to the purchaser as soon as possible after closing or other termination of this agreement.

The agent was not Dobrijevic personally but his company Excelsior Realty Group Ltd. of which he was the sole officer and shareholder. Dobrijevic deposited the funds in his trust account #507688 in the Toronto Dominion Bank on February 14, 1990 (Exhibit 5, tab 11) with the transaction being scheduled to close on March 30, 1990.

Pursuant to the direction in the offer, the funds were then transferred to the purchase of a G.I.C. (tab 16), from a Toronto Dominion Bank maturing in 31 days on April 2, 1990. We note on the bank's G.I.C. purchase agreement, the maturity instructions "Deposit to Account 507688".

In the meantime, the transaction had been terminated by the purchaser and on March 16, the solicitors for Indevco wrote to Excelsior demanding the return of the deposit. Considerable correspondence ensued between the solicitors for the purchaser and vendor with some being directed to the agent concerning the status of the deposit. What happened to the funds between the maturity of the G.I.C. on April 2, 1990 and October 29, 1990 is unclear, but on the latter date, the Toronto Dominion bank notified Dobrijevic that the trust account #0507688 would be credited with \$25,474.58 and immediately debited in the same amount with the purchase of another G.I.C. maturing in 30 days (tab 30) as of November 28, 1990.

The day before the G.I.C. matured, however, the bank notified Dobrijevic that pursuant to his instruction, \$25,000 together with the interest would be deposited in account #0507041 which was Excelsior's current account in the bank.

The advice which came from the bank was contained in the document which began as follows:

TD G.I.C. MATURITY ADVICE

As per your instructions, your account number 0507041 will be credited Nov. 28, 1990 with:

\$25,704.90

Particulars of this transaction are detailed below.

This document was directed to Excelsior Realty Ltd. In Trust, at 647 Wellington Limited, 1804 Avenue Rd., Toronto. The document was signed by a Mr. P.A. Thompson, the Manager of the Toronto Dominion Bank.

The Toronto Dominion Bank statement (tab 32) reflects a deposit of \$25,704.90 in the current account November 28, 1990, but by December 11 only \$1,099.83 remained in that account. Mr. Dobrijevic had withdrawn \$10,000 on December 3 and further cheques for his personal expenses largely depleted the account. The trust account #0507688 had only \$8,828.88 on deposit on November 7.

In the meantime, the parties to the agreement to purchase had entered into litigation with Excelsior as a co-defendant. Excelsior's solicitor on January 10, 1991 wrote to the purchasers (co-defendant's solicitor) requesting a consent to the deposit being paid into Court with a consent to dismissal of the action against Excelsior. This was followed by a letter personally written by Mr. Dobrijevic to the purchasers's solicitor as follows:

Pursuant to your letter dated January 21st, 1991, the undersigned will assign to court \$25,000.00 plus interest in the amount of \$25,704.90.

Curiously it was at this point that Mr. Dobrijevic wrote to the Toronto Dominion Bank on February 7, 1991 the following letter:

7 February 1991

Mr. Paul Thompson
Toronto-Dominion Bank
St. Clair Avenue at Christie Street
687 St. Clair Avenue West
Toronto, Ontario M6C 1B2

Dear Mr. Thompson:

re: Excelsior Realty Group Limited
507041 (General Account)
507688 (Trust Account)

Our bookkeeper has recently informed us that your staff has credited our general account in the sum of \$25,704.90. This amount appears to have been transferred from the Trust Account to the General Account without our knowledge or

instructions. Please rectify this matter at your earliest convenience.

Furthermore, we have also informed you to put a stop payment on cheque #522 in the amount of \$6,000.00 payable to National Trust which instructions have not been followed. As a result, the cheque has been cashed.

I suggest that we meet as soon as possible to rectify these two very serious problems.

Respectfully yours,
Don Ray Dobrijevic
President
c.c. Miles Obradovic, c/o Jewell, Michael
& Obradovic

The parties (purchaser and vendor) at this point had resolved the issue of where the deposit funds were to go and Alan Mostyn, solicitor for the vendor wrote to Excelsior on May 8, 1991 enclosing a Direction that the funds be deposited as follows:

1. The sum of \$6,250.00 made payable to Messrs. Sharpe, Inglis, Litwiller, in trust; and
2. The balance remaining, made payable to Messrs. Mostyn, Mostyn & Naiman, in trust.

AND FOR SO DOING this shall be your good, sufficient and irrevocable authority.

April 1991

This Direction was signed by the principals of Royal Indevco Properties Inc. and 647 Wellington Ltd. representing the parties.

The solicitor for Excelsior answered on May 8, 1991:

.....
As I indicated to you I will be pursuing this matter with the bank, but have discussed same with the principal of Excelsior Realty and have recommended, notwithstanding the actions of the bank,

that he must still honour his obligation as agent. I understand that he will be working to resolve this matter by way of payment on Monday, May 13, 1991. Would you kindly advise whether this will be acceptable.

No payment having been made, the purchaser on May 28 brought the Registrar's office into the matter and an investigation by this department began under a Mr. W.P. Antonacci. His report of July 16, 1991 contained the comment, "Trust Account Short \$25,000 Plus interest".

Over one year elapsed during which the Registrar's office made a complete investigation into the affairs of Excelsior and Mr. Dobrijevic. A report of Antonacci concluded on August 12, 1992 that the Trust Account was short \$24,993.18 (tab 83, Exhibit 5). Excelsior in the intervening period had failed to honour the Direction it had received from the parties either refusing or unable to repay the deposit funds.

The following day, however, a deposit was made into the Trust Account by cheque from Mrs. M. Dobrijevic in the sum of \$24,993.18 with a notation on the cheque "loan to Excelsior re 647 Wellington Street". These funds appear to have been held in the Trust Account for a period of some three months and then paid out to Mrs. Dobrijevic. No attempt was made by Mr. Dobrijevic at that time to honour the Direction by repayment of the deposit.

The purchaser then continued its action against Excelsior obtaining judgement in the Ontario Court General Division for the sum of \$25,191.64 on January 26, 1993. The Court also ordered Excelsior to pay to the vendor 647 Wellington Street the sum of \$7,690.21. A previous action had been taken by Lyons and Goodman, solicitors for Excelsior against that company for unpaid legal fees resulting in a judgement for \$3,000 and costs.

Dobrijevic in appearing before this Tribunal maintained that because of the bank's error in depositing the funds to his current account instead of the trust account, he was not responsible to repay the parties despite both their Direction and the judgement of the court. He had demanded from the bank written evidence of his instructions concerning the disposition of the proceeds of the G.I.C. which matured on November 28, 1990. This, of course, was not available because no Direction in writing was ever given to the bank. The evidence, however, of both Mr. Paul Thompson and Charlene Varty, senior accounts officer in charge of G.I.C.'s, clearly indicates that the bank did not require or request written instructions, particularly from a well known

customer, and frequently instructions were taken over the telephone. Mr. Dobrijevic contends he gave no such advice either by telephone or in person to anyone in the bank and it is simply an error by one of the bank employees.

We are, however, not of that persuasion. We have had the benefit of hearing Mr. Dobrijevic giving evidence and find his credibility as transparent as the web of a spider. He wonders why he is before this Tribunal pleading ignorance to any fault, indifference to those he has wronged and accusing his bank of negligence. He is a real estate broker who knows and should know from experience his duty and responsibility to his client. He has failed in both. Even when sufficient funds were deposited in his trust account by his wife, he refused to honour his obligation. He was advised by both the Registrar and his own counsel to repay the deposit, the issue between him and the bank being irrelevant, but ignored them together with a judgement of the Court.

In his evidence before this Tribunal, Mr. Dobrijevic proposes the bargain that if the Registrar were to permit him to keep his licence to practice, he would then repay the money. It is, however, no longer within the province of the Registrar since the matter is now before this Tribunal. We are, however, not disposed to countenance any arrangement where the honesty and integrity of the registrant is in issue having found on the evidence that the honesty and integrity of this appellant is completely lacking in substance. With regard to his company, he is the sole officer and director and under his Direction, it is similarly devoid of honesty and integrity.

The Registrar advances two grounds for his Proposal. We find on the second ground overwhelming evidence that the past conduct of Mr. Dobrijevic and his company afford grounds for belief neither will carry on business with integrity, honesty or in accordance with the law.

On the first ground, we are not persuaded there is sufficient evidence to support any conclusion. We, therefore, make no finding.

We do, however, find as a fact that the past conduct of Mr. Dobrijevic and that of his company for which he is solely responsible affords reasonable grounds for belief that his business will not be carried on in accordance with law and with integrity and honesty.

Therefore, by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act, the Registrar is directed to carry out his Proposal.

JOHN DONAGHY

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chair, presiding
SELWYN CHARLES, Member
MAURICE LAMOND, Member

APPEARANCES:

RICHARD PARKER, representing the Applicant

JAMES GIRLING, representing the Registrar under the
Real Estate and Business Brokers Act

DATES OF

HEARING: 2 June 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar under the Real Estate and Business Brokers Act dated September 30, 1993 to reject the application of Mr. Donaghy for reinstatement of his registration as real estate broker. The Registrar's decision was that the Applicant, Mr. Donaghy, was not entitled to registration under section 6(1)(b) of the Act as his past conduct afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

Both the Applicant and the Registrar were in agreement as to the facts, which are as follows:

The Applicant was first registered under the Act on August 10, 1982. That registration was as a sole proprietor broker, and it was renewed or reinstated from time to time until the most recent registration expired on March 2, 1992.

The Applicant submitted an application for reinstatement of his registration as a sole proprietor broker on May 21, 1992. That application was refused and is subject to the present appeal.

In each of the three applications which the Applicant submitted prior to 1988, he concealed his 11 convictions under the Criminal Code for alcohol related driving offences.

In his next application dated March 2, 1990, the Applicant concealed the fact that he was convicted under the Highway Traffic Act on October 25, 1988 of the offence of driving while disqualified.

In the present application for reinstatement of registration, the Applicant again failed to disclose a further conviction under the Criminal Code for impaired driving, the conviction having been entered on October 30, 1990. The Applicant was sentenced to six months' imprisonment and prohibited from driving for three years as a result of the said conviction.

The failure to disclose was intended by the Applicant in that he answered "No" to the question on the application form asking about previous criminal convictions and driving offences.

In fact, under his real name John Donaghy, birth date September 28, 1914, Mr. Donaghy had the following convictions and driving offences from 1971 to 1992: .

DRIVING RECORD

<u>EVENT</u>	<u>DATE</u>	<u>DESCRIPTION</u>	<u>DEMERIT POINTS</u>
SUSPENSION	71/12/20	EXPIRY 72/03/20 - FAIL TO BLOW	
CONVICTION	71/12/20	FAIL/REFUSE TO PROVIDE BREATH SAMPLE - CCC	
REINSTATED	72/03/20	SUSPENSION - EXPIRED OR RESCINDED	
SUSPENSION	74/06/05	EXPIRY 75/03/05 - BLOOD/ALCOHOL EXCEEDING .08 MGS	
***	74/07/19	SUSPENSION - NOT SERVED	
CONVICTION	74/06/05	DRIVING WITH MORE THAN 80 MGS ALCOHOL IN BLOOD - CCC	
REINSTATED	75/03/05	SUSPENSION - EXPIRED OR RESCINDED	
SUSPENSION	76/09/27	EXPIRY 77/03/27 - FAIL TO BLOW	
SUSPENSION	76/09/27	EXPIRY 77/03/27 - IMPAIRED	
***	77/02/16	SUSPENSION - NOT SERVED	
CONVICTION	76/09/27	FAIL/REFUSE TO PROVIDE BREATH SAMPLE - CCC	

CONVICTION	76/09/27	IMPAIRED DRIVING - CCC
REINSTATED	77/03/27	SUSPENSION - EXPIRED OR RESCINDED
REINSTATED	80/03/20	SUSPENSION - EXPIRED OR RESCINDED
SUSPENSION	80/06/18	EXPIRY 80/12/18 - BLOOD/ALCOHOL EXCEEDING .08 MGS
CONVICTION	80/06/18	DRIVING WITH MORE THAN 80 MGS ALCOHOL IN BLOOD - CCC
REINSTATED	81/01/20	SUSPENSION - EXPIRED OR RESCINDED
SUSPENSION	81/10/22	EXPIRY 82/04/22 - IMPAIRED
CONVICTION	81/10/22	IMPAIRED DRIVING - CCC
SUSPENSION	81/11/18	EXPIRY 84/11/18 - IMPAIRED
CONVICTION	81/11/18	IMPAIRED DRIVING - CCC
CONVICTION	81/11/25	IMPAIRED DRIVING - CCC
SUSPENSION	81/11/25	EXPIRY 84/11/25 - IMPAIRED
SUSPENSION	82/01/25	EXPIRY 85/01/25 - BLOOD/ALCOHOL EXCEEDING .08 MGS
CONVICTION	82/01/25	DRIVING WITH MORE THAN 80 MGS IN BLOOD - CCC
SUSPENSION	84/01/25	EXPIRY 87/01/25 - IMPAIRED
CONVICTION	84/01/25	IMPAIRED DRIVING - CCC
COLLISION	85/10/18	DISOBEY TRAFFIC SIGNAL
CONVICTION	86/03/03	IMPAIRED DRIVING - CCC
CONVICTION	86/03/03	FAIL/REFUSE TO PROVIDE BREATH SAMPLE - CCC
SUSPENSION	86/03/03	EXPIRY 91/03/03 - IMPAIRED
SUSPENSION	86/03/03	EXPIRY 91/03/03 - FAIL TO BLOW
SUSPENSION	88/10/25	EXPIRY 91/09/03 - DRIVING UNDER SUSPENSION - HTA
CONVICTION	88/10/25	DRIVING WHILE LICENCE SUSPENDED
TEST RESULTS	92/02/24	ROAD AND WRITTEN TEST IN G
CONVICTION	92/10/23	DRIVE MOTOR/VEH, NO VALIDATED PERMIT

To these convictions and driving offences must be added a new series beginning April 4, 1985 under the name Patrick J. Donaghy, birth date February 28, 1933. Mr. Donaghy in order to obtain a driver's licence when the one in his own name had been suspended, made an application under a false name viz. Patrick J. Donaghy and with a false birth date, thereby creating a fictitious identity. This enabled him to obtain a driver's licence; however, the subterfuge constituted an illegal and fraudulent series of acts by Mr. Donaghy.

The criminal convictions and driving offences which Mr. John Donaghy committed under the false identity of Patrick Donaghy, were as follows:

DRIVING RECORD

<u>EVENT</u>	<u>DATE</u>	<u>DESCRIPTION</u>	<u>DEMERIT POINTS</u>
COLLISION	85/07/27	SPEED TOO FAST	
CONVICTION	85/11/19	DISOBEY RED LIGHT	
ARTICLES RETURNED	89/08/31	DRIVER'S LICENCE	
CONVICTION	90/08/21	IMPAIRED DRIVING - CCC	
SUSPENSION	90/08/21	EXPIRY 93/08/21 - IMPAIRED DRIVING	
CONVICTION	91/06/17	SPEEDING 121 KMH IN 100 KMH ZONE	
CONVICTION	91/08/12	DRIVING WHILE DISQUALIFIED OR PROHIBITED-	
SUSPENSION	91/08/12	EXPIRY 94/08/21 - DRIVING DISQUALIFIED	

It is to be noted that Mr. Donaghy's driver's licence under the name Patrick J. Donaghy remains in suspension until August 21, 1994.

As with his previous applications to the Registrar, the Applicant failed to disclose any of the convictions or driving offences in his applications for registration or renewal dated February 1, 1988, March 2, 1990, and March 2, 1992. In fact, he answered "No" to all questions on the applications dealing with previous criminal convictions and driving offences.

The first witness to testify was Tim Thorpe, a Constable with York Regional Police for the last 27 years, who related the events leading up to the arrest of Mr. Donaghy pursuant to a car accident on October 18, 1985. He testified that Mr. Donaghy was not sober and refused a breathalyser test. He also stated that Mr. Donaghy produced a licence under the name Patrick J. Donaghy with a birth date in 1933. This led to a charge of obstruction of justice because of Mr. Donaghy's using a false identification. While this charge was eventually dropped, Mr. Donaghy was convicted of the other offences and admitted before this Tribunal that he did, in fact, produce an identification which was false.

Mr. Donaghy was eventually sentenced to nine months imprisonment.

The next witness was Peter Watts, a policeman, who

arrested Mr. Donaghy for impaired driving on August 6, 1989. He testified that Mr. Donaghy produced a driver's licence under the name of Patrick J. Donaghy. Thus, Mr. Donaghy was continuing to use his false identity on a driving licence despite the previous charges taken against him in 1985.

The next witness was Mr. Randy Persaud, a Registration Officer with REBBA who testified that all the problems in Mr. Donaghy's file were related to driving convictions which Mr. Donaghy did not disclose.

The next witness was Mr. Gordon Randall, Registrar of REBBA since 1988. He said that he based his proposal to refuse the reinstatement of Mr. Donaghy on Mr. Donaghy's pattern of deceit and falsehoods. He stated that every application filed by Mr. Donaghy failed to disclose his criminal convictions and driving suspensions. In addition, Mr. Donaghy illegally obtained a driver's licence under the name Patrick Donaghy simply because he was intent on driving his car despite the suspension issued against him.

Mr. Randall gave the following reasons for his refusal to reinstate Mr. John Donaghy:

1) Mr. Donaghy falsely answered the questions relating to his criminal convictions and driving suspensions. The Registrar depends on each individual making full disclosure in his application form because the office does not have the facilities to investigate each application it receives. In fact, searches of convictions and driving records are only made on a random basis and with respect to very few registrations. The Registrar must, therefore, rely on the integrity of each Applicant with respect to the information provided in the registration forms;

2) The conduct by Mr. Donaghy showed a continuous pattern of non-disclosure indicating that he would not act with integrity and honesty. At no time did Mr. Donaghy voluntarily make full disclosure of his problems, criminal convictions, and driving suspensions;

3) The criminal convictions themselves are serious, continuous, and show a pattern of disregard of the law. The unwillingness of Mr. Donaghy to comply with the law when it did not suit him was demonstrated by his conviction in 1988 of driving while his licence was suspended and doing so again in 1991. In addition, he obtained a driver's licence by using a false identity simply because he wanted to drive, which further underlined his disregard for the law.

Mr. Randall stated that the public must be assured that an applicant has integrity. Given Mr. Donaghy's continuous refusal to comply with Court Orders. There is reason to believe that Mr. Donaghy would also not comply with directives of the Registrar and the Act if it so suited him.

Mr. Donaghy testified next. He said he was born on September 14, 1928 and that his real name was John Patrick Joseph Donaghy.

He admitted obtaining a second driving licence by using a false identity and went on to say that doing so was foolish and desperate. He justified it by saying he needed the licence to get to work.

When asked why he answered "No" on all his application forms with respect to criminal convictions and driving offences, he answered that he was "embarrassed". He went on to say that he was an alcoholic until 1990 when he stopped drinking. He has not taken a drink since 1990.

In his testimony, Mr. Donaghy blamed his alcoholism for all the false answers given in his applications.

In cross-examination, Mr. Donaghy stated that after obtaining his false driver's licence under the name Patrick Donaghy, he transferred ownership of his vehicle to the false name. He continued to register new vehicles obtained under the false name.

He further testified that in fleshing out a false Patrick Donaghy identity, he gave a different residence address on the application forms. He thus followed a well thought-out strategy to establish Patrick Donaghy as a viable identity so that he could continue to drive a car while his John Donaghy's driver's permit was suspended.

In cross-examination, he further admitted that at the time of his last application in 1992, which also contained false answers, two years had passed since he stopped drinking. In other words, he was no longer under the influence of alcoholism when filling out his application form. He further admitted that he knowingly lied in the 1992 application. To a further question, Mr. Donaghy admitted that he is now driving his vehicle even though the driver's licence under the identity of Patrick Donaghy is presently under suspension and will remain so until August 21, 1994. He went on to state that he had obtained a driver's licence under his real name, John Donaghy and was using that permit as his basis for

continuing to drive. When asked why he continued to drive when his permit was suspended, he relied on the fact that that permit was issued in the false name of Patrick whereas the permit presently held was in his real name.

The Tribunal notes that inasmuch as it was Mr. John Donaghy himself who established a false alter ego with the name of Patrick Donaghy, a suspension to drive against Patrick was also a suspension to drive against John Donaghy. A reasonable person would know this and would have refrained from driving until the latter suspension terminated. The Tribunal finds that Mr. Donaghy has continued to drive when he knows or should know that he is not entitled to. In so doing, he is again showing a disregard for the law.

The final witness was Mr. Andre Forent, a salesperson who was an alcoholic until August 1969. He testified that he keeps in steady contact with Mr. Donaghy and believes Mr. Donaghy when he states that he has not touched a drink since 1990.

The Tribunal finds Mr. Donaghy's explanation for his conduct unsatisfactory. Mr. Donaghy has attempted to blame all his previous bad behaviour on his alcoholism. This might serve as an explanation for the untruthful answers he gave in his various applications prior to 1990. It might also explain his creating the false identity of Patrick Donaghy. It, however, no longer serves as an excuse after 1990 when Mr. Donaghy ceased drinking. From that point on, all applications were made when he was sober and knew what he was doing. Despite this, he again gave untruthful answers in his 1992 application and continued to wilfully flout the law in that he is driving in 1994 when his permit is still under suspension. That is, he continues to break the law even when he no longer is an alcoholic. This is further reinforced by his conviction in 1991, again during a period when he was sober, a conviction which was not disclosed in his application in 1992. Thus, Mr. Donaghy's pattern of deceit and lies has continued long after Mr. Donaghy's ceased to be suffering from alcoholism. Moreover, Mr. Donaghy has consistently failed to make full disclosure and thereby prove that he truly repented for his acts. Thus, in his letter to the Registrar dealing with his failure to disclose, he stated that that failure was the result of an oversight whereas before this Tribunal, he admitted that the real reason was that he was ashamed to admit he was convicted.

In fact, the Registrar only learned of Mr. Donaghy's previous convictions because of his allowing his registration as a broker to lapse and not because of any disclosure by him.

In the case of Richard Brenner vs. the Registrar of Motor Vehicle Dealers and Salesmen, the Divisional Court set the basis upon which a Proposal of the Registrar may be refused by this Tribunal.

At page 60 of their judgment, the Court held that this Tribunal should only refuse to direct the Registrar to carry out his proposal if "it thought that the Registrar was in error in concluding that the past conduct of the Applicant affords reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty." That the Tribunal might have found differently than the Registrar is not a basis for refusing the Proposal.

In the case of Dillon (1990) CRAT p.457, this Tribunal dealt with a similar case. Mr. Dillon blamed his problems on alcoholism and used that as his explanation for not disclosing convictions ranging over a period of eighteen years in his two most recent applications. Like Mr. Donaghy, he answered the question dealing with previous convictions with the answer "No".

The Tribunal held at page 460 of its judgment:

The difficulty, however, for this Tribunal is in its reconciling the evidence with the law. This is almost a classic case, embodying all the elements which militate against an applicant - non-disclosure, partial disclosure, consistent criminal convictions, alcohol abuse, evidence of reformation and years spent apparently without purpose or regard for those which remain.

We do not judge him, neither do we condone his behaviour, but only sympathise with this man whose future could possibly have been more consistent with his potential. Dillon is not unintelligent, but his behaviour has been sufficiently irrational to lead only to the conclusion of unreliability and that, in itself, leads to some concern were he to be licensed to practise in this field.

This tribunal is bound by the weight of the evidence and the latitude of the law. That latitude must be found within the

confines of Section 6(1) of the Act which provides:

(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

Honesty and integrity are cornerstones of the legislation. Therefore, when we are confronted with non-disclosure, partial disclosure, and criminal convictions, we must consider them as a reflection of the Applicant's integrity. Is there an attempt to deceive the Registrar in this failure to disclose the convictions? The evidence may either point to that or to the conclusion that it was the result of inadvertence. The onus, however, is immediately put upon the Applicant to prove inadvertence. In this matter, the Applicant has failed to satisfy that onus.

In the present case, Donaghy has certainly failed to satisfy that onus. In fact, all the evidence establishes that the failure to disclose was not because of inadvertence.

In the case of Minto Dorian Roy (1991) CRAT p.151, the Tribunal was again faced with an Applicant who had failed to disclose a number of convictions under the Highway Traffic Act. The judgment stated at page 155:

The Tribunal concludes that Mr. Roy has not proved that it was by inadvertence that question #6 was not fully answered. The Tribunal finds that Mr. Roy allowed the completion of the application form to be handled in such a way that a direct answer to question #6 could be withheld. To allow him to say that because he did not read the form and just signed blindly would relieve him of any responsibility, would go against the very nature of the Motor Vehicle Dealers Act and all other Acts in regulated industries. It is a cardinal cornerstone that the application by the registrant is integral to the whole

process of deciding whether he should be registered. The form itself being so important, therefore, the very failure to fill it out himself or to verify it would be sufficient grounds to reject any defence of inadvertence.

The judgment went on to state at p.156:

The Tribunal also refers Mr. Roy to the case of Gilford Garage Service and Ambury (1982) CRAT at p.53 and Doherty vs. Registrar of Real Estate and Business Brokers (1989) CRAT where the Tribunal stressed the importance of the application being filled out properly and the right of the Registrar to refuse or to revoke registration where the failure to disclose was serious.

It is therefore the judgment of this Tribunal that the Registrar was not in error in concluding that the past conduct of Mr. Donaghy afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Registrar, did in fact exercise his discretion in a reasonable manner.

The Tribunal, accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, directs the Registrar to carry out his Proposal to refuse the Applicant's registration.

ALBERT FACCENDA

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
A. DONALD MANCHESTER, Member

APPEARANCES:
G. BERLINGIERI for ALBERT FACCENDA

ALVIN TORBIN, representing the Registrar
under the Real Estate and Business Brokers Act

DATE OF
HEARING: 2 June 1994 Toronto

REASONS FOR DECISION AND ORDER

This was a hearing before the Commercial Registration Appeal Tribunal (CRAT) conducted on June 2nd, 1994 as a result of a direction of the Divisional Court issued April 11, 1994, arising from an appeal to that court of the decision of this Tribunal, released March 11, 1993 (the 1993 CRAT decision).

The Divisional Court stipulated the specific test to be applied from the case of Brenner v. Registrar of Motor Vehicles, Dealers & Salesmen (1983) 19 CRAT 58 as follows:

...whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal. [emphasis added]

In the instant case the Court stated that "the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought that the Registrar was in error in his belief". The Divisional Court expressed this further: "It is the totality of that past conduct, considered in the light of more current circumstances, which form the basis for the relief". [emphasis added]. The Court also stated that clause 6(1)(b) of the Act "requires a more qualitative assessment of the entire conduct

of an applicant to determine whether past conduct affords reasonable grounds for belief that he or she will not carry on business in accordance with law and with integrity and honesty".

Based upon these directions of the Divisional Court, the Tribunal, as reconvened, reviewed the evidence of the previous hearing contained in sixteen volumes of transcripts and 95 exhibits and received submissions from counsel for the Registrar and the Applicant. Before the Tribunal many grounds of conduct were presented as the basis for determining the past conduct of the applicant. All of these grounds were carefully examined by the Tribunal to determine their relevance to the test of past conduct of business by the applicant in accordance with law and with integrity and honesty.

The Registrar concluded both in his proposal and before this Tribunal that there were 11 specific grounds of conduct of the applicant which supported his proposal not to register the applicant. These were as follows.

1. He failed to disclose pending charges in his original application of March 25, 1986;
2. He answered the question in regard to pending charges in the negative which was false.
3. He was convicted of the offences and sentenced to a jail term and a period of probation.
4. As a police officer when the offences occurred, he breached the trust of the community.
5. He was charged with breaches of the Police Act.
6. He is an officer and director of a corporation convicted of an offence under the Rent Regulation Act and no restitution to tenants has been made by such corporation.
7. As a salesperson under the Act, he did not act in the best interests of Charles and Martha Bendzell in the purchase of an apartment building in Hamilton.
8. He traded in real estate while unregistered.
9. He applied for a licence under the Ontario New Home Warranty Plan Act and failed to disclose

the revocation of his real estate licence.

10. There were additional offences of conspiracy for which he was convicted on October 22, 1986, which he has failed to disclose.
11. He used business cards which misrepresented his capabilities and professional qualifications.

[page 2 of the 1993 CRAT decision]

1. Non Disclosure

[Grounds 1,2,9 and 10 of the 1993 CRAT decision]

There is no doubt that the applicant answered falsely the question in respect to charges pending against him in his application for registration of March 25, 1986. Has that conduct continued to the present? The Tribunal finds that it has not and that there is ample evidence to show reformation in that regard in the applicant's conduct. That evidence consists of the following.

In his application for registration on February 23, 1989 he made a detailed disclosure. The Registrar stated that notwithstanding this disclosure Faccenda failed to disclose an additional offence of conspiracy under Subsection 423(2) of the Criminal Code of Canada for which he was convicted on October 22, 1986. The Tribunal finds that if Faccenda had made no specific references to clause 423(1)(d) of the Criminal Code of Canada and Subsection 4(1) of the Narcotics Control Act his disclosure would have encompassed the charge under Subsection 423(2). In any event, Subsection 423(2) was repealed by Statutes of Canada, 1985, c. 19, Subsection 62(3) so that failure to make specific reference to it in the disclosure cannot in the view of the Tribunal be considered significant when the fact of the convictions and sentences were otherwise fully disclosed and no additional sentence was imposed as a result of the charge under that subsection of the Code. Furthermore the Probation Order filed before this Tribunal refers only to Subsection 423(1)(d) of the Criminal Code of Canada and to Subsection 4(1) of the Narcotics Control Act. Therefore the Tribunal finds that the Registrar erred in considering this item an element of evidence of non-disclosure.

The Registrar also relied on the failure of Faccenda to disclose revocation of his real estate licence in his application made May 10, 1988 for registration under the Ontario New Home Warranty Plan Act. At that time, the revocation of his license by the Registrar upheld by CRAT October 26, 1987 had been stayed by order of CRAT December 11, 1987 and was not confirmed until December 21, 1988 by the Divisional Court. In the meantime the Registrar under the Real Estate and Business Brokers Act renewed

the applicant's registration in March, 1988; the Registrar did not grant a new registration. Therefore the Tribunal finds that on May 10, 1988 there was no revocation of licence, that Faccenda's answers in his application were correct and the Registrar therefore erred in determining that a false answer had been given.

The Registrar also relied on the fact that in his application in early 1986 to the Metro Hamilton Real Estate Board Faccenda indicated that he was not employed in any other occupation while he was in fact a police officer although under suspension. Faccenda's application for registration under the Real Estate and Business Brokers Act was forwarded in March, 1986 and he was registered in May, 1986. He resigned from the Police Force in April, 1986, which facts are consistent with the conduct of one occupation; namely, that of a real estate agent. The Tribunal finds therefore that the Registrar erred in relying on this ground as in the opinion of this Tribunal the question was answered in accordance with what was intended to be the correct state of affairs at the time when his registration as a real estate agent was granted which according to the certificate of the Director was May 11, 1986.

2. Criminal or Illegal Activity

[Grounds 3,4,5,6 and 8 of the 1993 CRAT decision]

There is clearly evidence of criminal activity of the applicant in 1985 resulting in convictions on a plea of guilty in 1986.

The matter before the Registrar and therefore this Tribunal is whether that conduct for which Faccenda was sentenced to 1 year in prison plus 18 months probation has continued.

On the facts before the Registrar Faccenda was released from prison in January, 1987 and subsequently was granted early release from parole and probation on June 27, 1988.

The Registrar as part of the review of Faccenda's conduct referred to charges under the Police Act, as it then was, in 1985 which were not proceeded with because Faccenda's resignation from the Force on April 18, 1986 cancelled the jurisdiction of the Police Force to deal with the charges. The Registrar took the position before this Tribunal that those charges were therefore outstanding and not proceeded with simply because of lack of jurisdiction. The evidence before the Tribunal given by Sergeant Maxwell and contained in the transcripts reviewed indicated that the most serious charges were actually encompassed by the charges laid under the Criminal Code and the Narcotics Control Act. Moreover, the Tribunal finds that the fact that no decision was

made can allow the Tribunal only to conclude that charges were laid and never proceeded with. No finding can be made as to what the result might have been in respect to those charges. The laying of charges, not proceeded with, cannot result in a finding of conduct at the present time. The Tribunal also finds that they can have no greater impact on an analysis of the conduct of the applicant than the actual convictions which occurred in 1987. The Tribunal finds therefore that the Registrar erred in giving to those charges any greater weight than the convictions and sentencing under the Criminal Code of Canada and the Narcotics Control Act and in assessing those charges as additional evidence of current conduct indicating that Faccenda has not carried on business in accordance with law and with integrity and honesty.

The next indicia of illegal activity which the Registrar found against Faccenda were the charges laid in May 1990 under the Rent Regulation Act against a numbered company of which he was a principal and against Lloyd Ripani, the only other principal of the company. The Registrar found this to be evidence of continuing illegal conduct. In particular, a conviction was registered against Ripani and the numbered company based upon representations by Faccenda as agent for the company and Ripani that restitution would be made and in fact no restitution was made. Before this Tribunal evidence was given that restitution was not made on the advice of counsel because of the imminence of an appeal of the decision. Evidence was given that ultimately as part of the appeal process restitution was in fact made. The Registrar in his proposal before the Tribunal took the position that Faccenda as agent for Ripani and the numbered company and as a spokesperson for them discussed with Mr. David Grech in March of 1990 the illegal aspects of the conduct of Ripani who was acknowledged by David Grech and Faccenda to be the "hands on" manager of the building from which the charges emanated. Because of the small number of officers and shareholders the Registrar surmised that Faccenda must therefore have been aware of the illegal actions of Ripani and yet took no corrective measures.

The evidence before the Tribunal however, given by Grech was that in certain circumstances the activities might have been legal and in his letter of March 13, 1990 he suggested that legal advice should be sought in order to determine what should or should not be the action taken by the numbered company landlord. Subsequently the charges against Ripani and the numbered company were laid in May, 1990 in respect to another building relating to offences which had occurred in June, 1989 and March, 1990. Grech in his evidence clearly stated he had no basis for laying charges against Faccenda. He also testified that there was at least a third building owned by the numbered company for which no charges were laid. The Tribunal finds that there was insufficient evidence before the Registrar to implicate Faccenda in illegal conduct in

respect to the offences under the Rent Regulation Act, to impute to him knowledge of illegal conduct on the part of Ripani and the numbered company, to indicate a condonation by him of such activity in not making restitution or intentional misrepresentation on the part of Faccenda in requesting a lessening of fines based upon an intended restitution. The Tribunal therefore finds that the Registrar erred in determining that Faccenda's conduct in respect to the matters under the Rent Regulation Act indicate continuing evidence that he is conducting business contrary to law or that he lacks integrity and honesty.

The Registrar also submitted that Faccenda operated illegally as a real estate agent contrary to the provisions of clause 3(1)(b) of the Act in that his licence to trade was revoked by CRAT on October 26, 1987 and it was not reinstated until the order staying the decision was issued December 11, 1987 and that the evidence clearly indicated that he was acting as an agent for consumers Martha and Charles Bendzell during the period. He relied upon a director's certificate which indicated that Faccenda was not registered between October 26 and December 11, 1987. The Tribunal finds as a fact that the information contained in that certificate was provided by the Registrar's office and that the Registrar erred in providing that information. The basis for this finding is the practice of the Registrar in notifying registrants of the revocation of their licence. In the first instance based upon the CRAT decision of October 26, 1987 a notice of termination was sent to Faccenda on November 28, 1987 after the appeal period had expired. (In fact an appeal was launched on November 25, 1987.) Similarly when the decision of the Divisional Court upholding the CRAT decision was issued on December 22, 1988 the Registrar sent a notice to Faccenda on January 23, 1989 after the expiration of any further appeal period. It therefore appears that the termination of a licence is given only after the appropriate appeal period has elapsed. Counsel for the Registrar submitted that even if this practice were so Faccenda would have received the November 28, 1987 notification and should have immediately ceased operations. Faccenda stated in evidence, however, that he had consulted his solicitor when the CRAT decision was released, instructed him to appeal and was informed that he could continue to act as a salesperson. The Tribunal also notes that although the notice of the Registrar was dated November 28, 1987, there was no evidence submitted that it was mailed on that date. Furthermore, the application for a stay on its face was made on December 9, 1987 and Faccenda in his evidence indicated that his solicitor had informed him that the Registrar's solicitor would not oppose the application for a stay. On the basis of all these facts, the Tribunal finds that, pursuant to the CRAT order of December 11, 1987 staying the decision, no revocation of licence was in effect. Furthermore under the provisions of Subsection 9(4) of the Act the Tribunal is authorized "by order [to] direct the Registrar to carry out the

Registrar's proposal...". Therefore the decision of the Tribunal under Subsection (9)(9) of the Act takes effect immediately but that decision was "that the Registrar carry out his proposal" not to revoke the registration of Faccenda. The action of the Registrar on November 28, 1987 was the appropriate response and the effective date would have occurred sometime thereafter, except that on December 11, 1987 the direction to carry out the proposal was stayed.

Therefore the Tribunal finds that the Registrar erred in his finding that Faccenda contravened the Real Estate and Business Brokers Act in trading on behalf of the Bendzells.

3. Conduct of Business as a Real Estate Agent
[Grounds 7 and 11 of the 1993 CRAT decision]

The applicant was registered as a real estate agent from May, 1986 through to January 23, 1989. The Registrar determined that his conduct during that period disentitled him to registration.

The first element raised by the Registrar in this regard was that the applicant used business cards which allegedly misrepresented his qualifications in that the cards stated that Faccenda was a "real estate representative and investment consultant". While counsel for the Registrar submitted that Faccenda had undertaken no courses to so qualify him and while the Registrar indicated in his evidence that he was opposed to such designation it was clearly identified to the Tribunal that neither by the Act, by regulation or by general promulgation from the Registrar was there at that time any restriction in respect to this wording on a business card. The applicant also stated that through personal experience he had knowledge of investment processes in real estate. The Tribunal finds that the Registrar erred in determining that the use of such cards was conduct amounting to a breach of law or an indication of lack of integrity and honesty.

In regard to the dealings with the Bendzells, the Registrar in his proposal concluded that there had been a lack of integrity and honesty on the part of Faccenda in conducting his real estate practice. The Registrar relied on a number of facts.

The first of such facts was that the Bendzells were not fluent in English and Mr. Bendzell in particular was cajoled by Faccenda into signing offers on various apartment buildings in Hamilton without the knowledge or consent of Mrs. Bendzell and that Mrs. Bendzell communicated that objection to Faccenda. On the evidence before the Tribunal it was clear that Mrs. Bendzell continued to deal with Faccenda notwithstanding these complaints

and in fact did not object about the offer which resulted in the purchase of 150 Hughson Street until some time after the closing of the transaction.

A second fact relied upon by the Registrar was that in all of the apartment building offers there were no signed financial statements or compliance with the other requirements as set out in Section 33 of the Act in respect to a "trade in a business". Much argument was presented to the Tribunal as to whether the sale of an apartment building was the sale of a business. Conflicting views were expressed by the Registrar and by real estate salespersons from the Hamilton area. In particular the Tribunal notes that the definition of "business" in the Act specifically refers to "a boarding house, hotel, store, tourist camp and tourist home", but does not refer to apartment buildings or rental accommodation per se. In view of this imprecision and the lack of a specific address of the matter by the Registrar, the Tribunal finds that the Registrar erred in deciding that the failure to provide such a statement either evidenced a disregard for the law contained in the Act or an indication of a lack of integrity or honesty in the conduct of real estate business by Faccenda.

In fact the Registrar acknowledged that because of the sensitivity of the information vendors hesitate to provide such information until a signed offer and acceptance take place. The documents presented in evidence contained a schedule giving the purchasers the right of access to examine the financial records of the Vendor's operation of the building and in the evidence of the Bendzells it was clear that they did attend upon the premises, examined the property at least in part and the records located at the premises. The evidence also indicated that they engaged the services of a solicitor whom they had previously employed, Mr. Rubenstein, to whom documentation was provided.

On the basis of the evidence before the Tribunal, the Tribunal is satisfied that there was no improper conduct by Faccenda in dealing with the Bendzells in regard to the submission of offers and the ultimate acceptance of the offer on 150 Hughson Street in Hamilton. Although the documentation including the schedules attached was not of the sophisticated form which one would have expected in respect to a purchase of a building with mixed residential and commercial uses for a price of \$1,950,000, nevertheless there were safeguards contained in the agreement permitting the Bendzells to withdraw from the agreement if financing could not be obtained within 15 banking days and allowing them an opportunity within 20 banking days to withdraw if they were not satisfied as to the condition of the building leases, contracts, etc. The Tribunal is also satisfied that Faccenda brought to the attention of the Bendzells the necessity of retaining a solicitor to act for them and evidence submitted to the

Tribunal indicated that several solicitors were recommended or considered by the Bendzells. In fact, although one of the solicitors recommended to them by Faccenda, Mr. Rubenstein, had acted previously for Faccenda in the latter's investments, he also on a previous occasion had acted for the Bendzells. Although Rubenstein contended in his evidence that he did not deal with the Bendzells until after all the conditions were waived, the Tribunal finds that his evidence was not credible. The evidence of both Mrs. Bendzell and Faccenda that Rubenstein was consulted prior to the submission of an application for financing to London Life is much to be preferred by the Tribunal.

The Registrar also concluded that Faccenda acted with a lack of honesty and integrity in introducing Sandra Condo to the Bendzells. Evidence was given that in 1990 a financial scandal involving Sandra Condo broke. Countering this fact was evidence that Sandra Condo had acted for many years as a respected rent consultant in the Hamilton area. The evidence before this Tribunal indicated that the Bendzells failed to provide her with information in order to obtain rent increases and the relationship between her and the Bendzells ended in October, 1988. The Registrar based his conclusion on the further fact that Ripani and Faccenda received a mortgage from her in October, 1987 in order to support a financial obligation from her to them. Faccenda's evidence was that the arrangement was between her and Ripani and that when it came to his attention he released his interest in February, 1989. The Tribunal determines therefore that the Registrar erred in finding any relationship between the financial dealings by Ripani and Faccenda with Sandra Condo in 1987 and the information which she provided to the Bendzells concerning 150 Hughson or her actions on their behalf in processing the rent review application. The Bendzells freely admitted that they were able to obtain a rent increase for 1989 and there was no indication that, had they co-operated with Sandra Condo using the information available, they would not have obtained a rent increase for 1988. The Tribunal finds therefore that the Registrar erred in his conclusion that the introduction of Sandra Condo to the Bendzells reflected a lack of integrity and honesty on the part of Faccenda.

Further Dealings with Consumers; the Bendzells

What about the conduct of Faccenda subsequent to the acceptance and prior to the waiving of the conditions in the agreement of purchase and sale on November 27, 1987? The Tribunal notes that the timing was critical in that the financing condition was about to expire. A significant issue however was raised by the Registrar relating to the waiver of conditions, which document was prepared in the Comcan office for Mr. Bendzell's signature. The evidence of Mrs. Bendzell was that she was distracted and not

informed of what Charles Bendzell was signing. Mr. Bendzell's evidence was that he thought he was signing something related to the mortgage document. Instead it was a complete waiver of all conditions in the agreement of purchase and sale although 5 days remained in reference to the additional rights to examine documents and records. In the view of the Tribunal the nature of this document in releasing legal rights was such that it should have been clearly communicated to Charles Bendzell and Martha Bendzell, both of whom were required to participate in the financing documentation and should have been submitted to their solicitor, Rubenstein, for review with the Bendzells.

The Tribunal is disturbed by the fact that the solicitor for the Bendzells did not fulfil his obligations to his clients in that he failed clearly to communicate to them and to Faccenda that no documents should be signed without his review and approval. Notwithstanding this default on his part, the Tribunal notes that Faccenda had an obligation not to submit documents to the Bendzells without prior approval of their solicitor, such approval to be clearly identified, particularly when their understanding of English was limited, and also when there was a close business relationship between Faccenda and Rubenstein.

The Tribunal notes from Faccenda's evidence that he urged upon the Bendzells the necessity of having legal counsel from the time of the acceptance of the offer and therefore was fully aware of the serious aspects of this transaction. Notwithstanding this knowledge, the waiver of all rights of review was drawn without legal consultation. Because of the close business relationship with Rubenstein, the Tribunal considers the failure of Faccenda to communicate with Rubenstein inexplicable and to indicate a lack of integrity.

In the opinion of the Tribunal the waiver of all rights in respect of a \$2,000,000 transaction, bearing in mind the legal significance thereof, was not something which should have been done in the absence of the purchasers' solicitors. In fact there was no need to execute such a waiver -- financing was in place, therefore de facto that condition had been fulfilled. Moreover additional time was still available for the Bendzells to consider whether they were satisfied with the state of the building and its records and they were therefore giving up rights which might have been critical without the benefit of legal counsel.

The Tribunal is not unmindful of the fact that there was a solicitor who acted for the Bendzells from that date of November 27, 1987 until closing. The Tribunal is satisfied that during that period there was no responsibility on the part of Faccenda to act for the Bendzells and therefore is satisfied that his conduct was not in question after the execution of the waiver.

After the closing, however, when the Bendzells expressed dissatisfaction Faccenda caused an offer to be prepared by Philip Springer within a month of closing. This offer was presented to the Bendzells in the view of the Tribunal in an unprofessional manner. The evidence was clear that no prior discussion occurred between Faccenda and the Bendzells, that the offer when reviewed would indicate a substantial financial loss to the Bendzells and that this should have been reviewed with them and their solicitor before presenting it if the contention put forward by Faccenda that he intended it to be signed back is to prevail. Faccenda in his evidence stated that he had told Springer to put in a higher offer than that which was presented. On the basis of the offer which was prepared Faccenda should not have presented that offer without first clearly identifying it to the Bendzells.

The Tribunal finds therefore that there was substantial impropriety on the part of Faccenda in dealing with the Bendzells in regard to the preparation and execution of the waiver of all rights in the absence of legal counsel and in the presentation of the subsequent offer after closing which could not in any way be considered to be a financially beneficial offer for the Bendzells. These actions of Faccenda appear to the Tribunal clearly to represent a lack of honesty and integrity. Bearing in mind that the Act is consumer protection legislation which the Registrar is required to enforce and also considering the Brenner decision (supra) and the direction of the Divisional Court in this matter, the Tribunal concludes that the Registrar did have reasonable grounds for belief that Faccenda would not carry on business with integrity and honesty. The Tribunal also finds that subsection 6(1)(b) of the Act must be read disjunctively and that all elements need not be present. The Registrar and this Tribunal finding a lack of integrity and honesty in the dealings with the Bendzells noted above, this Tribunal cannot direct the Registrar to refrain from carrying out his proposal. Therefore, by virtue of the authority vested in it under subsection 9(4) of the Act, the Tribunal directs the Registrar to carry out his proposal.

STEPHEN VICTOR IRWIN

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding
SELWYN CHARLES, Member
A. DONALD MANCHESTER, Member

APPEARANCES:

NICHOLAS R. WHITE, representing the Applicant

JAMES GIRLING, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF

HEARING: 25 May 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar of Real Estate and Business Brokers dated April 22, 1993, to refuse registration to the Applicant, Stephen Victor Irwin, to trade in real estate as a salesperson.

In the Registrar's opinion, the Applicant is not entitled to registration under section 6 of the Act as the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The Registrar testified that the Applicant's registration form (Exhibit 10) was referred to his office as a result of positive answers to questions 3, 4, 5 and 6 on the form. He noted that the Applicant's disclosure of prior convictions was limited to a sheet attached to the application dated September 1, 1992 which read: "Convicted of impaired driving causing death, August 1991. Currently on parole." This sheet was signed by the Applicant.

Investigations conducted by the Registrar's office revealed that the Applicant also had been convicted of impaired driving on November 20, 1989. As well, he was convicted of five criminal charges on August 20, 1991, not just one. Count 1 related to his disclosure, Counts 2-4 were his convictions for impaired driving causing bodily harm, and Count 5 was his conviction for operating a motor vehicle while disqualified from doing so. This lack of complete disclosure troubled the Registrar as did the nature of the convictions.

The Registrar explained that providing a taxi service to clients is an integral part of the real estate industry. He also pointed out that the Applicant's period of parole does not expire until September of 1995 while his driving prohibition does not end until 1997. He itemized his concerns as the following:

- 1) lack of full and forthright disclosure;
- 2) recency of offences;
- 3) Applicant's pattern of conduct over 2-3 years; and
- 4) nature of offences.

The Registrar stated that the Applicant could re-apply after he has satisfied his parole requirements. He emphasized that the terms of the Applicant's first sentence which forbade him from driving had not been complied with at the time of his further offences. He did not believe that imposing terms and conditions on the Applicant's licence could be workable because of the impracticality of monitoring his conduct.

In his testimony, the Applicant detailed the rehabilitation program in which he continues to participate and his continued lack of consumption of alcohol. His evidence was given in a frank and believable manner as he explained the lessons which he had learned and his greater ability to deal with his problems. He stated that a friend is prepared to provide transportation if he should be registered as a real estate salesperson while Mr. Thomas Rendall is prepared to be his sponsoring broker and supervise his activities at all times.

Mr. Thomas Rendall testified that he had known the Applicant for eleven or twelve years and is prepared to be his sponsoring broker. He expressed his desire to assist in the rehabilitative process and any day-to-day supervision.

Counsel for the Registrar provided an exhaustive review of the case law when outlining the applicable factors to be considered in these circumstances. There have been few exceptions to the general practice of the Registrar in refusing to licence an Applicant while on probation or parole following a criminal conviction. He argued that the onus was on the Applicant to bring himself within these exceptions and he had not done so.

Counsel for the Applicant distinguished this situation from previous cases. He argued that the circumstances in the cases cited were more outrageous than in this particular case. In contrast, he argued that there was no indication that this Applicant was involved in crime or dishonesty. Although he had made some serious mistakes, he had paid the consequences and should not continue to be penalized.

Counsel for the Applicant argued that the Applicant had a successful real estate career with no complaints about his conduct as a real estate salesperson; a broker who is prepared to assist and supervise him closely; and a "reliable arrangement" for transportation. For these reasons, conditions could be imposed on his registration, he argued, and the Registrar was in error in refusing to register him.

The Tribunal does not agree. While the Tribunal was most impressed both with the Applicant's testimony and his efforts at rehabilitation, the Tribunal is bound by the standard of review established in Brenner 19 CRAT 58 and relied on in Vogelsberg, a decision of the Divisional Court released on February 7, 1994. The proper test as outlined in Brenner is that this Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks that the Registrar is in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The Tribunal does not find that the Registrar erred in his conclusion. Reasonable grounds for the Registrar's decision were provided by him when testifying; that is, the lack of full disclosure, recency of offences and continued parole, nature of the offences, and a pattern of conduct whereby the Applicant re-offended before completing his sentence from his first offence. The Tribunal agrees with the Registrar that attaching terms and conditions to the registration is not a practical solution.

However, the Applicant is reminded that the Registrar emphasized that it is not his position that the Applicant should never be registered as a real estate salesperson. The Tribunal directs the Applicant to section 10 of the Act: "A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

For the present, however, by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act, the Registrar is directed to carry out his Proposal.

PHILIP KENT and
KENT (OXFORD) REALTY INC.

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chair, presiding
A. DONALD MANCHESTER, Member

APPEARANCES:

MURRAY L. COULTER, representing the Applicant

ROBERT CONWAY, representing the Registrar under the
Real Estate and Business Brokers Act

DATES OF

HEARING: 24 August 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an application by Philip Kent and Kent (Oxford) Realty Inc. for registration as real estate brokers pursuant to the refusal of the Registrar to grant registration under the Real Estate and Business Brokers Act.

The reasons the Registrar advances are:

...the Applicants are not entitled to registration under section 6 of the Act as the past conduct of the Applicants affords reasonable grounds for belief that they will not carry on business in accordance with law and with integrity and honesty.

It is to be noted that the corporate entity Kent (Oxford) Realty Inc. was incorporated on August 28, 1992 and that Philip Kent is the President and sole officer and shareholder of that company. It is also noted that the corporation has not previously been registered under the Act and that an application for registration was submitted on August 31, 1992 at the same time as the application of Mr. Kent for renewal or reinstatement.

The Director's Certificate (Exhibit 5, tab 4) indicates Mr. Kent was first registered on November 26, 1986 with further applications for renewal being approved on November 9, 1988 and

October 1, 1990. His last employment was as a broker with Canada Trust which terminated his employment on June 29, 1992. He then decided to start his own brokerage through the above company Kent (Oxford) Realty Inc. and submitted an application for reinstatement of his personal registration as a broker on August 31, 1992 since his registration had lapsed.

It is the refusal of these applications by the Registrar that is the subject of this appeal.

An Agreed Statement of Facts has been submitted by the parties and reflects the following:

Although Mr. Kent had submitted three applications on his own behalf and one for his company, he failed to disclose two criminal convictions which should have accompanied his first application. It was not until a search was made by the office of the Registrar as a result of the corporate application that the convictions came to the notice of the Registrar. Both convictions were under the Criminal Code of Canada:

- (1) (s.423) conspiracy to export arms;
- (2) (s.123) failure to appear.

Subsequent to the application of August 31, 1992 being received by the Registrar, the Woodstock-Ingersoll & District Real Estate Board informed the Department that Kent Realty was "trading" in real estate since the company had advertised the sale of properties by means of an advertisement distributed in the Woodstock-Ingersoll area on or about the 8th September 1992. The Assistant-Registrar telephoned Kent on September 28 that he was not permitted to trade in real estate until he or his company received registration. Kent apparently agreed assuming he would be registered within a short period of time. The Department, however, continued to receive complaints from the Woodstock Board that Kent was continuing to trade and on October 20, the Registrar wrote him to the effect that since neither he nor his company had a valid registration, their trading in real estate was prohibited under sections 3 and 50 of the Real Estate and Business Brokers Act. Mr. Kent took issue with the Registrar's conclusion that he was trading which is defined as follows:

s.1 of the Real Estate and Business Brokers Act:

"trade" includes a disposition or acquisition of or transaction in real estate by sale, purchase, agreement for sale, exchange, option, lease, rental or

otherwise and any offer or attempt to list real estate for the purpose of such a disposition or transaction, and any act, advertisement, conduct or negotiation, directly or indirectly, in furtherance of any disposition, acquisition, transaction, offer or attempt, and the verb "trade" has a corresponding meaning;

In the meantime, an office had been established for Kent Realty at 596 Dundas Street, Woodstock, but after September 29, 1992, a Closed sign was displayed in the window. Nevertheless, 24 listing signs were on view in the front window on October 29, 1992 and a telephone with an operating message machine remained in place and in use.

Kent Realty appears to have been the selling broker for the following properties:

- (i) 17-19 Bay Street, Woodstock: the Agreement of Purchase and Sale was dated July 10, 1992, which was before Kent Realty was even incorporated;
- (ii) 516 Leinster Street, Woodstock: the Agreement of Purchase and Sale was dated August 25, 1992, which was before Kent Realty was even incorporated;
- (ii) 274 King Street West, Ingersoll: the Agreement of Purchase and Sale was dated December 23, 1992. Kent Realty was also shown as the listing broker in this trade.

Kent Realty further appears as the listing broker on three properties on September 19, 1992, the Spring of 1993 at which time an open house was conducted and on June 2, 1993.

Philip Kent was born in Waterford, Ireland on October 14, 1942 and came to Canada in 1966. He had attended University College, Dublin where he obtained a Bachelor of Science Degree in Agriculture. Having worked in Canada with some feed companies, he settled with his family in the Village of Tavistock, Oxford County employed by Martin Feed Mills.

On July 1, 1974, the R.C.M.P. came to his house, arrested him after a search of his premises and took him to Toronto for a Court appearance. He was charged with the offence of conspiring to export arms to Ireland and released on his own recognizance. He

pointed out that there were thirteen others, all charged with the same offence.

It appears from his evidence that he was Treasurer of an organization known as the Green Cross which was designed to assist the dependants of those jailed in Northern Ireland for what he calls political crimes. He said that as Treasurer, he signed a cheque for \$1,200 which was apparently used to buy arms without his knowledge - thus the charge of conspiracy.

On July 2, 1974, he retained a criminal lawyer (Arthur Maloney) who was representing six of the other thirteen accused. At the subsequent preliminary hearing, he was committed for trial by a higher Court and subsequently came before Madam Justice Boland for trial.

Having been advised by his counsel to plead guilty, he did so and was remanded out of custody for a period of one week for sentence. He said that in remanding him, the Justice told him, "You are a political activist. I am going to sentence you to 18 months. You are free to go home and come back in one week to receive your sentence." Mr. Kent then told his counsel as they left the court room that he would not be appearing since he intended to leave the country.

Kent left for Ireland in April 1975 and was, of course, charged with the additional offence of failing to appear. Curiously his wife and children remained in Tavistock and he says that he returned every year for some months, but was never apprehended. On July 23, 1983, however he returned to Canada and in December, the R.C.M.P. arrested him and took him to Toronto. He then retained counsel and on a plea of guilty was given a further five months for the second offence and incarcerated in Guelph where he served six months of the total sentence.

Three years later he registered in a real estate course.

In his defence of the allegation of non-disclosure on the application, Mr. Kent contends that he told someone at the Registrar's office that he had been convicted of a political offence and was told that the Registrar would be in touch with him if he required further information. He also maintains that later during the course for his broker's licence when Gordon Randall was lecturing, he was told by Mr. Randall (the Registrar) that he needed to disclose only those offences committed since the last renewal of his registration. Mr. Randall, of course, does not remember any such meeting and could hardly be expected to do so since he had lectured for a number of years. It is, however, unimportant since it is the failure to disclose the convictions on the first applications that is significant.

In his evidence and in his agreement to the Statement of Facts, Mr. Kent has largely admitted the allegations advanced by the Registrar in his Notice of Proposal. He, however, seeks to persuade us either that he was wrongly convicted or that the convictions were of no importance since they arose from political motives. The convictions per se are no longer important but the blatant disregard for the law in his flight from the jurisdiction while awaiting sentence is most significant. Mr. Kent may believe he is subject only to a higher law than that under which he was tried; he may believe that the political motives excuse entirely any behaviour which transgresses the law of this land, but we cannot, however, subscribe to that view.

The issue then becomes one of integrity and honesty and operating within the law. It is clear there was no disclosure on the first applications for Mr. Kent and his company. We are not persuaded that the explanations he has given are less than specious. He did, in fact, trade in real estate despite the warning from the office of the Registrar that he was not registered and permitted his company to do the same. Wherever we look in the evidence, there is a clear disregard of the law. We cannot, therefore, be persuaded that the Applicant will carry on business with honesty and integrity and in accordance with law when the Applicant either ignores or defies the law whenever it suits his purpose.

Therefore, by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act, the Registrar is directed to carry out his Proposal.

JACK KENNETH MARTIN

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE REGISTRATION

TRIBUNAL: JACINTH HERBERT, Vice-Chair, Presiding
SELWYN CHARLES, Member
JOYCE YASINCHUK, Member

APPEARANCES:

JACK K. MARTIN, appearing on his own behalf

ROBERT CONWAY, representing the
Registrar under the Real Estate and Business
Brokers Act

DATE OF
HEARING:

5 May 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Jack K. Martin from the Proposal of the Registrar of Real Estate and Business Brokers to refuse his application for registration as a salesperson under the Real Estate and Business Brokers Act.

Background

Martin, the Applicant, applied for registration as a salesperson by way of an application dated September 21, 1989. In his application, the Applicant answered "Yes" to question 3(b) which states:

Have you ever had a registration of any
kind refused, suspended, revoked or
cancelled? If yes attach particulars.

A separate sheet was attached in which particulars were set out as follows:

In 1983 the Law Society of Upper Canada took away my right to practice law in the Province of Ontario. This involved an investment in a business in 1979 & 1980 in the State of Florida which I considered to be a personal matter; they however felt that I had acted as a lawyer in the transaction.

The Registrar subsequently received a copy of the Law Society of Upper Canada's report on the Applicant's discipline proceedings. At that time the Registrar learned that on September 8, 1983 the Applicant was found guilty of professional misconduct for misappropriating \$125,000 U.S. which he held in trust. As a result of this misconduct the Applicant was disbarred on September 23, 1983.

The Applicant also answered "Yes" to question 4:

Has the applicant ever been involved in any bankruptcy proceedings?

He provided the following details as to his bankruptcy:

In November of 1980 I filed for personal bankruptcy and was granted an unconditional discharge in 1982.

The Applicant did not provide a copy of the discharge as directed in the application. Upon requesting this information from the Applicant the Registrar received a copy of a Supreme Court of Ontario Disposition of Discharge which clearly indicated that the applicant was discharged on January 17, 1990.

The Registrar issued a Notice of Proposal to Refuse Registration on July 29, 1992. By way of letter, received September 16, 1992 the Applicant indicated his desire to appeal. The Registrar has also filed a Notice of Further or Other Particulars referring to payments made by the Law Society of Upper Canada's Compensation Fund to the Applicant's former clients.

The Evidence

Evidence on behalf of the Registrar was given by Heather Werry, a lawyer with the Law Society of Upper Canada, and Ramone McKenna, the Registrar. The Applicant gave evidence on his own behalf. Kathyann Johnston, a councillor with the township of Rama appeared as a character witness for the Applicant. A number of letters were submitted by the Applicant as character references.

Mrs. Werry gave evidence that she has been a lawyer with the Law Society of Upper Canada since 1979. Her evidence was that on September 8, 1993, the Applicant was found guilty of professional misconduct after misappropriating \$125,000 U.S. from his trust account. Disbarment followed on September 23, 1993. In support of these statements she presented the tribunal with a copy of the Law Society of Upper Canada Report of the Discipline Committee confirming the disbarment and reasons therefor.

Mrs. Werry also gave evidence relating to events following the Applicant's disbarment and payments made out of the Law Society's Compensation Fund. According to Mrs. Werry payments are made out of this fund in instances where the Society finds that a solicitor acted dishonestly. It was the evidence of Mrs. Werry, based on The Law Society of Upper Canada Compensation Fund Index Information, that 69 claims were made to the Compensation Fund by former clients of the applicant. The Compensation Fund at that time paid up to \$125,000 per claim with a maximum recovery of approximately 36% per claim. The gross amount of the claims were \$2,081,975.52. In all \$369,521.27 was paid to 39 applicants as a result of the claims. Coopers & Lybrand, the receiver, recovered \$112,772.11. In explaining why only 39 of the 69 claims were successful Mrs. Werry referred to page 18 of the report. There, at paragraph 3, it states:

However it is the Society's position that the other claims are out of time and on that ground I should recommend that they be not allowed. Most of these claimants were not represented by Counsel. Those that were so represented were not prepared at their hearings to present any very meaningful legal arguments on what has turned out to be a difficult and important question concerning the Limitation section.

The Applicant did not contest any of the claims.

The Registrar, Mr. McKenna, gave evidence before the Tribunal relating to his investigation, and outlined his concerns and the basis for reaching the conclusions in his Proposal. His first concern was with regard to the Applicant's claim that he was discharged from bankruptcy in 1982 and his initial failure to comply with the request in the application form by enclosing proof of his discharge. When proof was belatedly submitted in the form of a Supreme Court of Ontario Disposition of Discharge, it indicated that the discharge was obtained on January 17, 1990. In referring to the court document he noted that the court endorsement, based on a December 12, 1983 entry, read as follows:

On consent this application is adjourned
sine die to be brought on for hearing on a
date to be fixed by the asst registrar.

The Registrar indicated that it was his view that the Applicant's letter indicating that he was granted an unconditional discharge in 1982 was false, and that at the date of his application he was not discharged.

With respect to the Applicant's disbarment, the Registrar referred to the Law Society of Upper Canada Report of the Discipline Committee, pp. 6 - 8. In referring to the events leading up to the Law Society's finding of professional misconduct and the Applicant's disbarment that document reads as follows:

On April 3rd, 1980, he received the first \$25,000.00 U.S. pursuant to the agreement, which was dated the same day. Payment was in the form of a certified cheque, drawn on the U.S. Dollar Trust Account of the law firm Christie, Herron, Stephenson, Saccucci & Mathews at the Toronto Dominion Bank and payable to "Richardson & Martin, In Trust". The Solicitor endorsed the cheque, and Bev Robbins, the bookkeeper for his law firm, invested the funds pursuant to his instructions in a 30 day term deposit in U.S. funds with the Royal Bank of Canada, in Brampton

On April 9th, 1980 the Solicitor instructed his bookkeeper to cash in the term deposit. This was done, and a U.S. dollar draft in the amount of \$25,000.00, was drawn by the Royal Bank to the order of "Richardson & Martin, In Trust". On his instructions, she then endorsed the draft over to Marbro Ltd. On the following day, April 10, 1980, the Royal Bank branch wired \$24,987.36 U.S. to the First State Bank of Arcadia, Florida, to the credit of the account of Florida State on the order of Marbro Investments.

The Solicitor received a further cheque, in the amount of \$100,000.00, dated April 24th, 1980. It was drawn on the account of Dodge with a bank in Naples, Florida, and was payable to "Richardson & Martin, In Trust". On May 5th, 1980 the Solicitor endorsed the back of this cheque, which was marked "Cheque Payable to the Royal Bank of Canada" and "Per: Richardson & Martin", and on his instructions Bev Robbins purchased a 30 day term deposit in U.S. funds.

On June 16th, 1980 the Solicitor authorized the Royal Bank to wire \$45,000.00 U.S. from the term deposit in the name of Richardson and Martin to the Exchange Bank, Tampa Florida to the account of the First State Bank of Arcadia on behalf of Marbro Limited. On June 24th, 1980 the Solicitor authorized the Royal Bank to wire a further \$50,000.00 U.S. from the term deposit to the Exchange Bank, Tampa, Florida to the account of the First State Bank of Arcadia on behalf of Marbro Limited, to make the balance of \$5,000.00 payable to Marbro Limited, and to deposit the interest in the Richardson & Martin trust account.

On June 10th 1980 Richard F. Stephenson advised the Solicitor by telephone that his client, Dodge had not been able to obtain financing and demanded return of the \$125,000.00 deposit. He repeated his demand by letter the next day. On the following day, June 12, 1980 Jack Martin advised him by telephone that the money was in a term deposit which would not mature until June 27th, and that he would not return the money unless he first received a letter from Stephenson and his client indemnifying him against the lost interest.

There were several further letters and telephone calls between Stephenson and the Solicitor to either return the funds as soon as possible or to have them held on behalf of Dodge until the maturity date to avoid loss of interest. On June 17th, 1980, Stephenson advised the Solicitor by telephone that he would commence proceedings for return of the deposit, damages, interest and costs. It was not until July 27th 1980 however, during the course of a Motion for Replevin that Stephenson learned that the funds in question were no longer being held in trust.

The Committee heard testimony from five witnesses, including the Solicitor. Four

gave evidence on behalf of the Society, Richard Stephenson, Dodge's lawyer; Margaret Richardson, from the Royal Bank in Brampton; William Henderson, an investigation auditor on the staff of the Law Society; and Bev Robbins, who was the Solicitor's bookkeeper. Their testimony was clear and straight forward. The Solicitor's testimony was unfortunately vague. Taken at face value it neither confirms nor denies that he authorized the transfer of funds. The Committee prefers the evidence of the preceding four witnesses.

The Registrar indicated that Mr. Martin's disbarment is of concern because the Applicant misappropriated funds he held in what was clearly a trust relationship. He found the Applicant's particulars as to his disbarment to be vague and demonstrative of a lack of insight as to the seriousness of his previous conduct. He also noted that the Applicant's sponsoring broker would not be privy to the information which is now before the Tribunal when she certified that the information in Martin's application was accurate to the best of her knowledge.

The Registrar also indicated concern about Mr. Martin's former dealings with his clients which led to payments out of the Law Society of Upper Canada's Compensation Fund. In outlining his concerns he referred to the Law Society of Upper Canada Compensation Fund Index Information. He referred to the claim of Elizabeth Bidlake, which appears at p. 26 of that document and states as follows:

This claimant is an old age pensioner and is also in receipt of supplementary allowance....

The claimant had never had any dealings with Martin until she went to him in about March 1978 for the purpose she says, of having him draw a will for her. At this same interview Martin suggested to her that she put some money into a mortgage company he had formed. Without further ado she gave him \$25,000 that same day which counsel for the Society admits. These funds went into certificates of Marbro.

He then refereed to the claim of G. Wilson Fraser, also set out in the noted document. At page 34 it reads as follows:

The claimant is 74 years of age he and his wife live on their Old Age pensions along with a small amount of investment income....

In 1977 the claimant had a mortgage mature at which time Martin gave him a strong pitch to invest the proceeds in the Marbro M.S. Fund. As a result the claimant so invested \$25,000 over a period from July 4th, 1977 to July 11th, 1978. He received interest for the period up to December 31st, 1979, which interest totalled \$5,494.76....Mr. Bell has admitted the dishonesty of Martin in this matter and for the reasons set out in my previous Report herein I find the loss was in connection with Martin's law practice. I therefore recommend that the claim be determined at the said sum of \$19,772.30 and that the claimant be paid from the Fund the amount set out in the schedule hereto and so report.

He also referred to the claim of Olive Pearl Johnston against the Law Society's Compensation Fund in the amount of \$150,000. At p. 48 of the report it states as follows:

The claimant is a 67 year old widowMartin handled Mrs. Johnston's investments in several mortgages but gradually moved her investing in the direction of the M.S. Fund. Her own words in her statement accompanying her application to the Fund effectively describes Martin's method of operation - "I had always thought M.S. Certificates were what everyone was given when they put money in mortgages with Jack Martin".

There is no doubt that there was a substantial solicitor and client relationship at all relevant times which Mr. Bell readily admits. Needless to say this unfortunate claimant lost all her

capital that she invested in the M.S. Fund. Mr. Bell admits that her loss was caused by the dishonesty of Martin in connection with his law practice.

Lastly he referred to the claim of Vern Robert Manser and Isabella Scott Manser against the Compensation Fund of the Law Society in the amount of \$40,000. He specifically referred to page 26, which states:

These claimants have some modest pension income. Mr. Manser served with the Canadian Army during the arduous fighting in Italy during the Second World War. He was severely wounded in action and had to have one of his legs amputated. His pension for this disability is minuscule...That Martin would deprive a person such as this claimant of his needed retirement funds was so contemptible as to defy any adequate descriptions.

The Applicant

The Applicant's evidence was very brief. He indicated that his intention was not to avoid giving full disclosure on the application form. The Applicant testified that he knew the Registrar would obtain his records from the Law Society of Upper Canada. He felt that his use of the phrase "took away my right to practice" was equivalent to using the term "disbarment". He was of the view that he was wrongly disbarred as he did nothing criminally wrong. The Applicant indicated that as a result of the Law Society's investigation he was criminally charged and convicted on a number of counts of fraud, all of which were overturned in the Appeal Court. The Applicant indicated that because of the emotional and financial stress of the criminal proceedings he was unable to appeal his disbarment to the Divisional Court. He also stated that at the time he was also of the view that he did not want to practice law again.

The Applicant also indicated in testimony that it was his honest belief that he had been discharged from bankruptcy in 1982, as set out on his application form. He indicated that the bankruptcy occurred during his trial. According to the Applicant, his then solicitor, Harry Black, subsequently told him that he was not in bankruptcy. The Applicant stated that it was not until 1990 when he went to get copies of his discharge that he noticed that he had not been discharged in 1982. The Applicant indicated that he forwarded the document to the Registrar despite the discrepancy

with no intentions of malice and that his disclosure of a minor traffic incident shows that he was forthright and honest.

With respect to the Compensation claims, the Applicant indicated that these events occurred during his trial and that he was advised by his solicitor not to attend. He was of the view that he did not defraud anyone and that he owed the claimants nothing; he strongly indicated that he had paid with the last ten years of his life.

The Applicant stated that he is now 56 years of age and that following his disbarment he worked at various low wage jobs and experienced long periods of unemployment. He stated that he is currently employed at Mike's Mart in Orillia at a salary of \$6.35 per hour. He also works at an Esso gas bar four days a week. He said that he has moved up to managing the gas bar and that he often deals with sums of money as great as \$4000 dollars. The Applicant presented a copy of a letter from his employer, Joe Browne, dated May 5, 1992, stating that the Applicant has been in Esso's employ since January of 1992. At page 4 of that letter Mr. Browne says:

Jack Martin has been involved from the start and still is. Mr. Martin has had access to cash, inventory control and all financial knowledge and will continue to have such, until the time Mr. Martin moves on to bigger and better things, as he so warrants and deserves.

Mr. Browne did not appear as a witness and his letter did not indicate whether he had knowledge of the difficulties Mr. Martin had faced, although the Applicant's evidence is that he did. The Applicant also stated that he is involved in many community activities: he has belonged to the Orillia Literacy Program for three to four years, and now trains other people. He is the founding director of the Simcoe Women's Resource Centre. He is also the founding President of the Star of Hope Spiritualist Church in Orillia. He said that he has worked hard over the past years and believes he could do a good job in real estate sales.

Kathyann Johnston, a councillor with the Township of Rama, was the Applicant's only witness. Ms. Johnston testified that she has known the Applicant since September of 1992. She also attends Star of Hope Spiritual Church and has attended workshops run by the Applicant. She gave evidence that the Applicant is a fair and compassionate man. It was her view that people feel safe dealing with the Applicant and that he is a honest individual. In responding to questions by Mr. Conway she indicated that the Applicant has discussed his disbarment with her but not the compensation matter.

No other witnesses appeared for the Applicant, but he has submitted eighteen reference letters from individuals who attest to his fine character. Among them is a letter from Ron Brown Q.C., a solicitor with the firm of Blake, Cassels & Graydon, who says that he has known the Applicant for over twenty-five years. Mr. Brown indicated that he has knowledge of Mr. Martin's difficulties. In the third paragraph of his letter he states:

Although I have not had any recent involvement with Jack, I have always known him to be a conscientious, hardworking and caring individual. My experiences with Jack during those difficult times convinced me of his trustworthiness and overall reliability. These are fundamental ingredients of his character. I feel certain that Jack would carry on any business undertaking in which he is involved in accordance with the law and with integrity and honesty.

Decision

The Registrar has given two grounds in the Notice of Proposal to Refuse Registration. The first is based on clause 6(a) of the Act which reads:

(a) having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business...

The Tribunal is of the view that the Registrar bears the onus of establishing this position. The evidence before the Tribunal is that the Applicant is a discharged bankrupt. While the Registrar has indicated that the Applicant has experienced financial difficulties in the past there is nothing before this Tribunal to suggest that such difficulties still exist. While the Registrar refers to persons who lost money at the hands of the Applicant, he has not proved that the Applicant has any responsibility to reimburse those individuals. The Registrar's Proposal cannot succeed on this ground.

The second ground set out in the Notice of Proposal to Refuse Registration is in accordance with s.6(b) of the Act. That clause reads:

(b) the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in

accordance with law and with integrity and honesty...

This Tribunal is guided by the principle set out in Brenner vs. Registrar of Motor Vehicle Dealers and Salesmen. There, at p. 4, Mr. Justice Southey of the Ontario Divisional Court stated:

...the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

The past conduct with which the Registrar indicates concern with relates to the Applicant's disbarment in 1983 and the Applicant's prior dealings with his clients. The Registrar has provided this Tribunal with extensive evidence relating to the Applicant's disbarment. That evidence shows that the Applicant was found guilty of professional misconduct after misappropriating \$125,000 U.S. from his trust account, and subsequently disbarred. The Applicant was present at his discipline hearing and was unsuccessful in his defence. The Registrar also presented evidence that several of the Applicant's clients lost monies as a result of the Applicant's activities, which necessitated payouts from the Law Society of Upper Canada's Compensation Fund. Of concern to the Registrar was the fact that many of the Applicant's client's appeared to be elderly and vulnerable.

The fact that the Applicant is a disbarred lawyer is a significant one which was addressed in the case of Michael J. Delaney (1984) CRAT Volume 13, p.262 . In upholding the Registrar's proposal to refuse the applicant's registration the Tribunal stated:

It is a most significant factor that the Appellant has been disbarred from a profession in which the Code of Ethics has as an initial heading "Integrity" and in which Rule #1 reads:

"The lawyer must discharge his duties to his client, the court, members of the public and his fellow members of the profession with integrity"
(emphasis Tribunal's)

The commentary on the rule, (which cannot be controverted), is as follows:

"Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession."

Now the Appellant is seeking entry into a vocation in which the Legislation has spelled out as one of the criteria, in addition to that, for example, expected of all vocations, "in accordance with the law" also that of acting with "integrity". The standard is just as high for those who seek entry to the real estate vocation as it is to the legal profession. Indeed, those who practice the vocation of real estate do count themselves as professionals and subscribe to the same high standards.

If a fundamental quality of the practise of law is "integrity", the Legislature has also expressed that same quality, which must be considered therefore fundamental of those in the business of real estate....

This Tribunal is guided by the principle in Jakobs v Registrar of Real Estate and Business Brokers. At page 226 of that decision the Tribunal states:

...An overriding principle is that any Applicant must show through a long course of conduct that he or she is a person to be trusted and not unfit to be registered under this Act. "Integrity and honesty" are not merely words. They are standards that must be met. While the onus is on the Registrar to show that a person is disentitled under the Act to registration in the circumstances such as those before us, the Applicant must establish that his conduct and character will be unimpeachable and that there are no reasonable grounds for belief that he will not act in accordance with these standards.

It is this Tribunal's opinion that the Applicant has been unable to establish that " his conduct and character will be unimpeachable and that there are no reasonable grounds for belief that he will not act in accordance with standards of integrity and honesty." In making this finding the Tribunal has given regard to the Applicant's own evidence and notes that the Applicant was most vague in dealing with the subject of his disbarment and the Law Society's Compensation Fund payments. He gave little explanation as to his dealings with respect to \$125,000 U.S., the subject of his discipline proceedings. The Applicant appeared absorbed in the perception of wrongs which he perceived were done to him and showed little regard for members of the public who suffered losses. The Applicant was of the view that he has paid with ten years of his life.

The Applicant's only witness is Kathyann Johnston, a councillor with the Township of Rama who claims to have known the Applicant for only one year. While the Applicant has provided the Tribunal with letters attesting to his character he has not called any of the authors as witnesses.

This Tribunal believes that the application form is indicative of recent conduct. Indeed the importance of the application process has been considered by this Tribunal before. In Gilford Garage Service and Ambury vs. Registrar of Real Estate and Business Brokers, at page 53, this Tribunal stated:

The Tribunal is of the opinion that the application is basic to the formation by the Registrar of a judgment, never easy at any time, as to the fitness of an applicant to be registered. He is entitled to a full disclosure of all facts - all the relevant past conduct, upon which to base the judgment. He did not receive that in these instances.

In Doherty vs. Registrar of Real Estate and Business Brokers, 18 CRAT (1989) p.268, the Tribunal stated as follows:

The Registrar must be able to rely fully and without question on the answers given on all applications in order to protect the public interest.

The failure of an applicant to properly answer can allow applicants to be registered to the possible jeopardy of the public.

In Peter Kodis 14 CRAT (1985), p.187, the Tribunal stated at p.190:

The Tribunal is of the opinion that the past conduct of the Applicant is the factor to be considered. Time and time again, this Tribunal has pointed out the seriousness of nondisclosure of matters...Though it would appear that the Registrar, in the discharge of his responsibilities, checks and double checks by obtaining records, this is a responsibility and obligation which should not necessarily be upon the Registrar. He should be entitled to rely upon the application form which is submitted to him. The Applicant has given explanations in respect of certain omissions yet those omissions are of a kind that the Tribunal can infer that there was some act of deliberation in respect of the omissions and the selection of convictions which were made known.

The lack of complete disclosure and, indeed the Applicant's selective disclosure also add to this Tribunal's doubt with respect to the Applicant's honesty and integrity.

This Tribunal is guided by the decision in Ronald W. Northover (1984) 13 CRAT, p.292,

...the overriding consideration here is the question of policy and the question of public perception of the policies which will be followed and used as guidelines by the various Registrars who are charged with the responsibility of presiding over the various industries all coming within the jurisdiction of the Ministry of Consumer and Commercial Relations.

For all these reasons this Tribunal directs the Registrar to carry out his Proposal.

Accordingly, by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to revoke the registration of the Applicant.

DARYL MELNYK

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding
HERBERT ROBERTSON, Member
A. DONALD MANCHESTER, Member

APPEARANCES:
CONSTANTINE TSANTIS, representing the Applicant

ROBERT CONWAY, representing the Registrar under the
Real Estate and Business Brokers Act

DATES OF
HEARING: 1, 2, 15 December 1993 Toronto

REASONS FOR DECISION AND ORDER

Mr. Melnyk appeals the decision of the Registrar under the Real Estate and Business Brokers Act (the "Act") to refuse to grant him registration as a real estate salesperson.

By Proposal dated June 7, 1993 and a Notice of Further or Other Particulars dated November 29, 1993, the Registrar determined that Mr. Melnyk was not entitled to registration under section 6 of the Act on the grounds that:

1. the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; and
2. having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business.

Although the application which was the subject of the proposal was dated March 19, 1993, a new application dated December 14, 1993 was filed with the Tribunal as a result of the withdrawal of one sponsoring broker by letter dated December 13, 1993 and the agreement to sponsor by another broker confirmed by letter dated December 14, 1993.

Mr. Melnyk was convicted on two counts of trafficking in a narcotic, namely cocaine, on June 23, 1989. He was first registered as a salesperson under the Act on March 28, 1984. Prior to the March 19 and December 14, 1993 applications mentioned above, he filed three previous applications dated March 28, 1988, April 12, 1990 and April 13, 1992.

Each of the three previous applications contained the following question or a question very similar to it:

"Have you ever been found guilty or convicted of an offence under any law or are there any charges now pending? This includes where a conditional discharge or an absolute discharge has been ordered."

Mr. Melnyk answered "No" to this question and its equivalent in the three applications. When he completed his application dated March 28, 1988, he failed to disclose that two charges of trafficking were pending against him. In his applications dated April 12, 1990 and April 13, 1992, he failed to disclose that he had been convicted of the charges.

Section 50 (1) (a) of the Act makes it an offence for anyone to provide false information in an application. The importance of full disclosure to the Registrar has been stressed in several decisions of this Tribunal. As stated in the case of Raj P. Chopra released June 8, 1993: "While the test is the cumulative effect of the Applicant's past conduct, the Tribunal agrees that the Applicant's non-disclosure in his applications to the Registrar weighs heavily in an assessment of relevant past conduct."

Mr. Melnyk presented explanations for his non-disclosure which the Tribunal does not consider credible. He claimed that his sponsoring broker, Mr. Joshi, had promised to "take care" of things and submitted the applications for him. Although Mr. Melnyk's mother appeared as a witness and supported his version of events, Mr. Joshi denied much of what they had to say. The Tribunal finds that much of the evidence presented by the Melnyks was contradictory, self-serving and evasive.

The Tribunal is offended by Mr. Melnyk's filing of what appears to be a false document (Exhibit 21). This document was supposedly a copy of the letter which Mr. Melnyk claimed to have given to Mr. Joshi to submit with his 1990 application. The letter discloses details of Mr. Melnyk's convictions in response to what is referred to as Question 10. The applicable question in 1990 was Question 6. There was no Question 10 of this nature until

1993. The inescapable conclusion is that Exhibit 21 was prepared in 1993 and backdated to April 12, 1990.

The Notice of Further or Other Particulars dated November 29, 1993 adds the allegation that Mr. Melnyk concealed the judgment registered against him in favour of the law firm of Ruby & Edwardh. He answered "No" to Question 5 in the application dated April 13, 1992 which asked if there were any unpaid judgments outstanding against him.

The Tribunal did not find plausible Mr. Melnyk's assertions that he was unaware of the above judgment because he had moved from 40 Strathearn Blvd. to a new address. The letter from Ruby & Edwardh dated December 6, 1989 states: "... it would be most unfortunate for us to have to proceed against you be way of taxing the account and obtaining judgment. I have begun taxing procedures and unless I receive payment immediately, I shall be forced to continue proceedings." Although Mr. Melnyk claimed not to have received this letter, a registered mail receipt was signed for delivery of the Assessment Appointment and Order. It appears unlikely that the signatory was not someone designated to receive mail in his absence. As well, it was surely not coincidental that five post-dated cheques were mailed to Ruby & Edwardh within a short time after the December 6, 1989 letter and delivery of the Assessment Order. Further, Mr. Melnyk sent his lawyer a letter with 40 Strathearn Blvd. listed as his mailing address on November 19, 1990.

The Tribunal finds the evidence of the Melnyks that the "mailing address" was a typing error as implausible as the explanation that the registered mail which was signed for in December, 1989 was not received and that the reference to Question 10 in Exhibit 21 was a typing error.

The second ground of the Registrar's proposal was based on the belief that having regard to his financial position, Mr. Melnyk cannot reasonably be expected to conduct business in a financially responsible manner. The evidence of Ms. Edwardh reinforced the Registrar's position that the continued non-payment of her firm's account raises serious questions about his ability to conduct himself in a financially responsible manner.

The firm's account was rendered in June, 1989. In January of 1990, Mr. Melnyk sent five postdated cheques which were drawn on a closed bank account. In a letter to the firm dated November 19, 1990, Mr. Melnyk offered to send a certified cheque if the account was reduced to 10% of the amount outstanding. Even though the account was reduced by 75%, he made no payment. On August 28, 1992, he wrote to Ms. Edwardh with the assurance that he would pay the account on October 25, 1992. This was not done. It was not

until five days prior to this hearing that he paid the account.

Although counsel for Mr. Melnyk argued that the non-payment of the Ruby & Edwardh account was a "trivial matter" which should not disqualify him from his rights under the Act, his inability and/or unwillingness to settle an outstanding account involving such a fairly small amount of money was treated as significant by this Tribunal.

Mr. Melnyk's testimony was riddled with inconsistencies, not the least of which related to the nature of his relationship with his sponsoring broker. He stated both that Mr. Joshi is and is not his sponsoring broker; that he would and would not be working with Mr. Joshi; and that Mr. Joshi gave false evidence about him at the hearing. Not surprisingly, Mr. Joshi withdrew his sponsorship in the middle of the hearing.

The Tribunal finds considerable merit in the Registrar's submission that Mr. Melnyk, in his conduct and testimony during the course of this hearing, actually compounded the deception and misleading which he had practised in the past. An inescapable inference is that this conduct would extend to his dealings with the public.

Counsel for Mr. Melnyk argued that section 6 (a) of the Act applies more to a broker than an agent since an agent has no dealings with money but merely shows and describes houses. However, normal practice is that an agent receives deposits and it is expected that this money will be handled in a financially responsible manner.

Given the standard of review set out in Re: Brenner 19 CRAT 58 by the Divisional Court, this Tribunal cannot find under the circumstances that the Registrar erred in concluding that Mr. Melnyk's past conduct provided reasonable grounds for belief that he will not carry on business in accordance with integrity and honesty and that, having regard to his financial position, he cannot reasonably be expected to be financially responsible in the conduct of his business.

Accordingly, by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse to register the Applicant under the Act.

STEVEN MOIR

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, Presiding
GARY ZALEPA, Member

APPEARANCES:

STEVEN MOIR, appearing on his own behalf

CHRISTINE CHRISTOPHE, representing the Registrar
under the Real Estate and Business Brokers Act

DATE OF

HEARING: 11 January 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant from a Proposal of the Registrar of Real Estate and Business Brokers set out in a Notice of Proposal dated May 5, 1993, whereby the Registrar proposed to refuse to renew the registration of the Applicant as a real estate broker. One single reason was given by the Registrar for this action, namely, that the past conduct of the Applicant afforded him reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

This conclusion on the part of the Registrar led him to the decision that he should refuse the Applicant's application for renewal of his registration pursuant to the provisions of section 6(1)(b) of the Real Estate and Business Brokers Act:

Section 6(1)

An applicant is entitled to registration
or renewal of registration by the Registrar
except where

.....

(b) the past conduct of the Applicant
affords reasonable grounds for belief that
he will not carry on business in
accordance with law and with integrity and
honesty;

The law is clearly established that this section gives a discretion to the Registrar which is not given to the Tribunal. The Tribunal should only refuse to direct the Registrar to carry out his Proposal if it thinks him in error in his conclusion. See the decision of the Divisional Court on appeal from the Tribunal in re Richard Brenner (1983) 19 CRAT - per Southey J. at p. 61:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

It is not sufficient for the Tribunal to conclude that it would have exercised a similar discretion differently. It should only reverse the Registrar's decision if it concludes that he was in error and that there are not reasonable grounds for his conclusion. We have referred to this at the outset of these reasons in order to note and deal with the point which arises in this case which, while not novel, will arise in only a small fraction of cases. This is that the Registrar, who issued the Proposal and is the man whose discretion we are reviewing is not the incumbent Registrar at this time and was not the witness who came before the Tribunal and gave the evidence in support of the exercise of the discretion leading to the decision in the Proposal.

On this point, the Tribunal has reached the decision that the Respondent Registrar's case does not fail on this ground for two reasons. In the first place, while it is the practice of a Registrar who issues a Proposal to come before the Tribunal at such a hearing and give his evidence in support of his conclusion we do not think it always essential that he do so. In this case, without the evidence of Mr. Randall, we would still have had the Proposal of Mr. McKenna and the evidence of the facts upon which it was based. In the second place, we had as a witness before us Mr. Randall, the present Registrar who reached the same conclusion on the same facts and gave us his reasons for doing so.

The relevant facts are not much in dispute. The Applicant was first registered under the Act as a salesperson on October 13, 1983. On June 23, 1986, he changed his registration to that of an associate broker which he has held to the present time. On August 23, 1991, the Applicant became employed by Ontario Hydro as a Senior Property Agent in its Corporate Real Estate Department. It was agreed at the hearing by both parties that his work, or at least part of his work with Ontario Hydro comes within the

definition of trading in real estate pursuant to the Real Estate and Business Brokers Act and it was also agreed by both parties that to carry on these activities the Applicant does not need a registration under the Act by reason of the exemptions provided in Section 5 thereof and particularly clause (f) of that Section.

On his application for renewal of his licence dated June 18, 1992 (Exhibit 8), the Applicant indicated that he would be employed by Ontario Hydro and the Registrar's office sought more details of this from him which he provided. These details led the Registrar to conclude that there is an inherent or potential conflict of interest for the Applicant in carrying out his duties with Ontario Hydro and being employed and acting as a broker with a private real estate brokerage firm at the sametime. In his testimony at the hearing, Mr. Randall said that, while he has no evidence that any consumer has been adversely affected by Mr. Moir in this respect, there certainly rises a perception of conflict of interest. So long as he continues in these capacities, he owes duties of good faith and full disclosure and also the duty of confidentiality both to his employer Ontario Hydro, his brokerage firm and to any client of that firm for whom he acts. The evidence disclosed that Mr. Moir had acted in connection with three private real estate transactions through his firm during the time of his employment with Ontario Hydro. Mr. Randall said that the number was not the issue - it is the concern for the perception of risk to the public and the potential for conflict of interest.

During the course of dealing with the application, the Registrar's office had a search made as to any criminal record on the part of the Applicant and discovered the following:

<u>DATE & PLACE</u>	<u>CHARGES</u>	<u>DISPOSITION</u>
Aug. 03/77 Hamilton	Possession of a Narcotic	Cond. discharge & prob. for 1 yr.
May 07/82 Hamilton	Possession of a Narcotic	Fined \$200. 1/d 30 days

His first application for registration was dated August 31, 1983. On it he answered "No" to the question whether he had any convictions. On an application for renewal on July 22, 1985, he gave the same answer. On applications for registration as a broker and renewal of this registration on May 29, 1986, March 28, 1988, May 7, 1990 and June 18, 1992, he gave the same negative answers.

The wording of the question changed over the period in question so that there is an arguable case that in the earlier instances his answer may not be a false one, but there is no doubt that on the wording on the later occasions, his answer was a false one.

In his testimony, Mr. Randall said that he had some concern with the fact of the repeat offence. Normally convictions simply for possession of marijuana, particularly when they do not follow an initial charge of possession for the purpose of trafficking, are not considered so serious by him. But where there are repeat offences this fact tends to indicate that the person involved did not comprehend the seriousness of such action on his part. Mr. Randall said that the more serious consideration from the point of view of his office and of himself was of the filing of the application with the false or misleading information. He repeated evidence which he has given in many cases that the Ministry must be entitled to rely upon the truth of the information in these applications or the whole system of dealing with them could not function. In his defence, Mr. Moir said that his failure to disclose was the result of an honest mistake on his part with no intent to mislead. As mentioned above, an argument can be made that the wording and the facts pertinent to the earlier documents could support this conclusion. However, by 1992 the question read:

Have you ever been found guilty or convicted of an offence under any law or are there any charges pending? This includes where a conditional discharge or an absolute discharge has been ordered.

If yes, attach full particulars on a separate signed and dated statement.

Note: Where the applicant has been previously registered, list only those convictions, conditional discharges, absolute discharges or charges which have not been previously disclosed.

To this Mr. Moir replied "No". Mr. Randall said that Mr. Moir appeared to him to be quite intelligent (all of the evidence which the Tribunal has would corroborate this conclusion) and had to know that this answer was not correct.

In his defence, Mr. Moir also established that there had never been a single complaint made against him by a member of the public or by another realtor. He produced seven letters of reference for his good character and a written statement from both Ontario Hydro and his broker/employer advising that they were aware of his employment or association with the other and had no objections. While these letters of reference do not carry the same weight as would character witnesses actually called at the hearing, they do corroborate his evidence that he has generally a good standing in his community and the fact that the only criticism to be made of him are the two upon which the Registrar relies.

One other piece of evidence should be mentioned being a letter from Ontario Hydro dated November 12, 1993 (Exhibit 22) advising Mr. Moir that his status has been declared surplus and indicating that he will not be employed in his present position and perhaps not at all at Ontario Hydro beyond July of this year. Of course, if he leaves Ontario Hydro the conflict of interest issue will no longer exist. However, the Tribunal must agree with the submission of counsel for the Respondent that we must determine the case upon the facts as they exist today. Following this evidence, Mr. Moir stressed to the Tribunal that, if and when he loses his employment with Ontario Hydro he will be needing this registration to make a living for himself and his family.

In argument in support of their respective cases, both sides referred to previous decisions of this Tribunal - some of which we shall note. In the case of Gilford Garage Service and Ambury (1982) 11 CRAT 52, the Tribunal states at p.53:

The Tribunal is of the opinion that the application is basic to the formation by the Registrar of a judgment, never easy at any time, as to the fitness of an applicant to be registered. He is entitled to a full disclosure of all facts - all the relevant past conduct, upon which to base the judgment. He did not receive that in these instances.

This is quoted with approval in the case of John Ernest Barroso (1990) 20 CRAT 422 and the Tribunal comes to the same conclusion in that case stating at p.429: "The Registrar did not receive full disclosure of all facts of all the relevant past conduct in this application from Mr. Barroso."

In both of these cases, the Tribunal upheld the Registrar's decision.

The Tribunal wishes to refer to the decision in the case of Bonnie Wilson released on April 10, 1992, in which the Tribunal said at p.11:

It must be remembered that the Ministry receives many thousands of these applications for registration and renewal of registration every year and without a tremendous increase in facilities to deal with them and, therefore, in cost and red tape it would be completely impossible for the Ministry and for the Registrar and his office to function and deal with these applications without being able to rely fully upon the information set out on the face of each application. If none of the questions are answered to indicate any problems, the applications must be processed in a routine way and the licences issued almost automatically. The fact that any of the questions have been answered falsely on such applications will only be picked up through random spot checking or by chance.

Accordingly unless an Applicant has a real and accepted explanation that he or she honestly believed that the false information was, in fact, true at the time of its submission or unless the false information is of rather minor consequence, the Tribunal cannot overrule the Registrar. To do so would be to open the option to anyone who would prefer to conceal some information. To try doing it that way first, knowing there is always a good chance he would not be caught and even if he were caught, he would still have a chance of explaining it away without having to meet the test as presently laid down.

Mr. Moir relied upon the decision in the case of Shahan Guler (1991) 21 CRAT 204. In this case, Guler had a conviction in 1968 for indecent assault of a female person upon which he received a suspended sentence. On his application for a licence in 1973, he had failed to disclose this. In 1989, he was again charged with sexual assault of a female person but this charge was subsequently stayed. In dealing with the appeal at the bottom of p.210, the Tribunal said:

In this appeal, the Tribunal has concluded that the Registrar is in error to refuse to renew Guler's registration. In this appeal, the penalty is too severe for the offence of failing to disclose a pending charge. The Tribunal has concluded that in this case any reliance on an event in 1968 not disclosed in 1973 is too far removed from today to form a fair basis for a decision which will have such drastic results. As the Tribunal has consistently supported the principle of disclosure to the Registrar, we believe that a penalty for failing to disclose in this situation is appropriate.

Mr. Moir submitted that his offences were much less serious and, therefore, that the proposed penalty is much too severe.

The Tribunal must agree that Mr. Moir's offences were less serious than those of Mr. Guler and, were it not for the additional ground of the conflict of interest and the fact that Mr. Moir disclosed nothing until found out and put to an explanation, we would have probably considered a suspension as appropriate here.

However, the Tribunal must find on the evidence we have that there was a deliberate attempt to withhold vital information on the later if not all of the applications. Accordingly upon the facts and circumstances of the case as presented to the Tribunal, we are not able to say that the Registrar is wrong in its conclusion. We wish to add and point out that, if the Applicant leaves his position as indicated with Ontario Hydro by the middle of summer, he can then re-apply well within the two year period limited for doing so without having to retake the courses required for an initial application. If he then makes proper disclosure, this fact together with the facts that his convictions are less serious than those in other cases including Guler's case and he will have been without a registration for a period which will be the equivalent of a suspension, may lead the Registrar to look more favourably upon him at that time. However, as we have already indicated we must decide the case now upon the facts as presently existing and accordingly the Tribunal, pursuant to the authority vested in it by section 9(4) of the Real Estate and Business Brokers Act directs the Registrar to carry out his Proposal.

ANTHONY MORELLO

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chair, Presiding
MAURICE LAMOND, Member

APPEARANCES:

PETER BURNET, representing the Applicant

ROBERT CONWAY, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF

HEARING: 23 September 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Anthony Morello from the decision of the Registrar of Real Estate and Business Brokers to refuse him registration as a real estate salesperson under section 8 of the Real Estate and Business Brokers Act. The Registrar in his notice of proposal gives as his reason:

the past conduct of the Applicant affords
reasonable grounds for belief that he will
not carry on business in accordance with
law and with integrity and honesty...

In an Agreed Statement of Facts submitted in evidence, the following is admitted by the parties.

The Applicant was first registered under the Act on December 5, 1984 as a salesperson.

His registration as a salesperson continued over the years until October 9, 1991.

On October 9, 1991, the Applicant's employment was terminated by his employer-broker at the time. His registration also lapsed on that date because he did not transfer his registration to another broker within 60 days.

The Applicant then submitted an application for reinstatement of his registration dated August 28, 1992. The Registrar notified the Applicant by letter dated October 7, 1992 that:

(1) his application would not be processed until he was released from all the responsibilities and obligations of his parole;

(2) he could not carry on business as a salesperson until he was registered.

The Applicant brought an application for Judicial Review in the Ontario Court (Divisional Court) seeking a declaration that he was entitled to trade as a salesperson pending his appeal to the Commercial Registration Appeal Tribunal under section 9 of the Real Estate and Business Brokers Act. This application was dismissed on February 15, 1993.

The subject of this hearing is the Registrar's Proposal to refuse the application dated August 20, 1992.

The Applicant pleaded guilty to four counts of trafficking in cocaine on September 5, 1991. He was sentenced the same day to five years in prison.

The case was reported in the local media.

At the time of his arrest on October 1988, the Applicant was employed as a salesperson with Campanale Real Estate Ltd. in Ottawa ("Campanale"). He commenced employment there on November 1, 1984 and was one of the top salespersons in the company during his four years there.

The Applicant's employment with Campanale was terminated on account of the charge of trafficking.

The Applicant informed the Registrar of the trafficking charges in a timely way. He disclosed them in his renewal application dated December 20, 1988, which was approximately seven weeks after he himself was notified of the charges.

The Applicant was granted a day parole release at the earliest point in his sentence because of his good behaviour during incarceration.

When the Applicant commenced his parole, Mr. Campanale informed the Registrar that he was willing to employ the Applicant again.

The Applicant did not disclose in any of his four applications that he pleaded guilty and was convicted on November 16, 1978 at Ottawa of the offence of fraudulent use of a credit card - s.301.1 of the Criminal Code. He was sentenced on November

27, 1978 to 12 months' probation. The conviction arose from the accused attempting to use a credit card that was not his at a restaurant to purchase food and drinks totalling \$37.95 for himself and a friend.

The Applicant's reason for his non-disclosure will be in issue at the hearing.

Since the facts are not in dispute, the only issues before this Tribunal are the reasons for the non-disclosure of the first criminal offence, the seriousness and depth of the Applicant's involvement resulting in the second offence and the effect of his continuing on parole.

The Registrar, Gordon Randall in his evidence outlines his concerns which he contends preclude the Applicant's registration at this time. He points not only to the conviction, but to the nature of the offence of trafficking in cocaine which he says fits well within section 6 of the Act. The length of sentence, five years, were substantial reflecting the seriousness of the offence. This, he observes, lends serious doubt that the Applicant will carry on business with honesty and integrity.

Continuing Mr. Randall points out that in his view, the Applicant's sentence has not been completed until his parole ends. That is in 1996. Even though he has been released, he is still under sentence of the Court - an undesirable situation for one trading in real estate.

With regard to the allegation of failure to disclose a criminal conviction, the Registrar said Morello had been convicted of fraud on November 16, 1978 but failed to disclose this in his four applications of October 26, 1984, September 15 1986, December 20, 1988 and August 28, 1992. He further advised that included with the application of December 20, 1988, Morello wrote a letter to the Registrar in which he states: "I, Tony Morello have had no criminal record as to date: although on October 27, 1988, I was accused and charged with trafficking."

This statement, Randall points out, is patently false.

Asked by counsel why full disclosure is important to him, the Registrar replied, "The accurate and truthful application is a reflection of the Applicant's honesty and integrity. Only random checks can be made." In consumer legislation, public perception is most important he contends since public trust is involved. Replying to Morello's counsel in cross-examination, Randall agreed that there was no evidence Morello profited from the offence of trafficking or that there had been any complaints from the public concerning his real estate practice. On the contrary, he seems to

have done very well in the business as a real estate salesman enjoying considerable success. With respect, however, to the offence, he contended the media coverage of it gives rise to the public perception of honesty and integrity which is immediately betrayed by the charges and convictions.

Anthony Morello is 37 years of age and resides in Gloucester, Ontario with his parents. It appears he left school while in grade 10 and went into the construction business for some five years and later into the real estate business. In his evidence, he said his social life during those years was with school friends meeting in a bar and he first started using drugs in 1978 - at first infrequently - and then more often. It was a social thing he said to use cocaine. In 1981 he stopped completely, but in 1987 went back to it a few times and then stopped not having used drugs since.

With regard to the non-disclosure of the first offence, he contended that having repaid the funds, he did not believe he had committed a criminal offence. The Court record, however, discloses on conviction he was given 12 months' probation. He maintained that he was unaware that he had a criminal conviction until he was charged with trafficking in 1988.

It is unnecessary for this Tribunal to dwell on the events which culminated in the appellant's arrest and conviction for trafficking. He was sentenced to five years which is, of course, a penitentiary sentence and this per se reflects the seriousness of the offence. It is true, however, that the appellant was released on parole at the earliest time he could have been and this reflects his behaviour while incarcerated. His parole officer, Nick Gravonic, giving evidence, said that conditions were attached originally to his parole but since these were honoured, the appellant was then granted full parole by the National Parole Board.

Concerning rehabilitation, Mr. Justice D. McWilliam said in his reasons for sentencing:

I don't really think that there's probably any need for rehabilitation in the normal sense and probably there is, I trust, no need for specific deterrence in the sense that I don't think this accused needs to be deterred from getting involved in any of these matters once again or, I trust, in any matters like that.

On the other hand, the Justice continued,

Mr. Morello is sort of second on the totem pole of a year-long investigation in which a number of persons, if my memory serves me, something like eighty-five, were charged and the Crown sort of feels in a rough sense of justice, I suppose, that Mr. Morello deserves to stand relatively high on the totem pole of those sentences, and there's a certain logic in that. Who can deny that?

.....

Why it is relevant to conduct is, of course, that he was absolutely necessary to the transactions, and he knew it. He was an accommodating party. He was the person who introduced all of the principals involved: the phoney purchasers, the sellers. He introduced all of them. Without him, nothing would have happened. Without him, the 800 grams that he was involved with, which is roughly about 3 1/2 pounds of cocaine, would never have gotten into the market. Now we know the last 2.1 pounds did not get into the market because the arrest took place, but the potential was there because of his conduct and what he did for 3 1/2 pounds of cocaine getting to the market.

The Hon. Justice continues in his deliberation and comments on the appellant's conduct before the Court when he says:

So there may be considerable justification for saying that the accused in matters of business is straightforward and is honest, and I say no more than that. Certainly on any legal finding on the material before me suggests that he is honest and trustworthy.

Mr. Gravonic, a former O.P.P. officer and case manager for Correction Services Canada has handled some 2,000 cases over the years. He is an experienced parole officer and was impressed by the attitude of Morello to the extent that he offered in evidence the comment "You would like to have 500 Tony Morellos in your caseload because it makes you think the system is working." He agreed, however, that Morello's sentence is not complete until his parole ends in September 1996.

Rocco Campanale, a broker since 1976, and now a broker with the Ottawa Real Estate Board has 22 agents in his firm. He had employed the Applicant in 1984 and during his four year association with him was impressed with his ability as a salesman. He said "his honesty was never in question and I found him to be fair dealing and took him at his face value". He concluded with saying he would again employ him as a salesman: "I am willing to give him another chance." Susan Robinson, another Ottawa broker and a Director of the John Howard Society in her evidence emphasized that it would be most unfair to deny this Applicant his registration since he was, when employed in her office, honest in his dealings and she would employ him again.

In his argument on behalf of the Registrar, Mr. Conway points to three elements, the cumulative effect of which should preclude Mr. Morello's registration.

We have the credit card fraud many years ago, but the undisclosed conviction arises from it.

There is a subsequent involvement in drugs initially for his own personal use and later on a substantial scale for trade. This concluded with the arrest and convictions on three indictments of trafficking. On the first offence, the court decreed a sentence of 5 years and similar ones on the other two to run concurrently.

The Applicant's involvement in drugs was purely for gain motivated by greed Mr. Conway contends and he wonders what Morello would do today when the real estate business is at its lowest ebb in many years. Would he again turn to a more lucrative enterprise perhaps not entirely legal? That uncertainty, he says, poses a risk in a regulated industry.

The third issue militating against the Applicant's registration is parole. Mr. Conway points out the Registrar has no assurance of complete rehabilitation until at least sentence is complete and the broader public interest may no longer be at risk.

Summing up on behalf of the Applicant, Mr. Burnet points to two words - "honesty and integrity". Unless the Registrar has reasonable grounds to believe the Applicant will not carry on business with honesty and integrity, he argues, the Applicant is entitled to registration. As far as the policy of refusal because the Applicant is on parole is concerned, Mr. Burnet contends it is not set out in the Act and it is a fundamental tenet of law that the Registrar cannot operate outside the Act. On this point, counsel is quite correct in that there is nothing in the Act prescribing the policy apparently adopted by the Registrar. But much has been left by the Legislature to the discretion of the Registrar and the decisions of this Tribunal. The Divisional Court

in interpreting the legislation in the matter of Richard Brenner CRAT Vol. 19 p.58 has upheld the mandate of the Registrar to decide whether or not an Applicant is fit for registration as a result of his past conduct and parole is clearly a reflection of past conduct. The Court went further in pointing out that this Tribunal must find the Registrar's Proposal in error or it should be supported.

There is a long line of decisions of the Tribunal which entirely supports the Registrar in his policy of refusing to grant registration to an Applicant while he is still on parole. For this Tribunal to decide otherwise is tantamount to ignoring the law as it has been laid down in its many previous decisions.

It is further incumbent upon this Tribunal to weigh carefully the evidence supporting the appellant since it must persuade us the Registrar has erred in his Proposal. Although much of the evidence favors the appellant particularly the character evidence, we are not persuaded either that the Registrar was wrong in his Proposal or that the Applicant should be registered while still on parole from three concurrent sentences of five years each.

On the issue of the past conduct of the appellant which is the main ground of the Registrar's Proposal, there is clearly sufficient evidence that his past conduct affords belief that he will not carry on business with honesty and integrity. The fact that one of the transactions involving the traffic in drugs took place in his real estate office gives rise to the possibility of future dealings of the same nature in this most convenient atmosphere.

There is certainly not sufficient evidence before us to dissuade this Tribunal from upholding the Proposal of the Registrar.

Therefore, by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act, the Registrar is directed to carry out his Proposal.

DENNIS RADOS

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
A. DONALD MANCHESTER, Member

APPEARANCES;

COLE RAFTERY, representing the Applicant

ROBERT CONWAY, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF

HEARING: 26 October 1993

Toronto

REASONS FOR DECISION AND ORDER

In this matter, the Registrar seeks to revoke the registration of the appellant as a salesman under the Real Estate and Business Brokers Act on the grounds that:

In the Registrar's opinion, the Registrant is not entitled to registration under section 6 of the Act as the past conduct of the Registrant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

In support of his Proposal, the Registrar alleges the Applicant has 9 convictions under the Criminal Code of Canada, one under the Narcotic Control Act and 18 offences under the Highway Traffic Act (Exhibit 7, tabs 3 and 4). It is to be noted that these convictions resulted from pleas of guilty and are not denied by the appellant.

The registrant further alleges that in four of his five applications from July 1983 to September 1989, the appellant failed to disclose the convictions and answered "No" to the question, "Have you ever been convicted of law of any country or state or province thereof of an offence or are there any proceedings pending."

On his application of September 9, 1991, Rados admitted two driving convictions which had resulted in a suspension of his licence to operate a vehicle, a criminal conviction for forceable

confinement of his girlfriend, together with assault occasioning bodily harm and a conviction under the Narcotics Control Act. He disclosed no other offences.

On April 3, 1992, the Registrar's office requested a letter of criminal record from the appellant since the disclosure on his application did not appear to be in accord with the information in the possession of the Registrar.

The response by Rados was to direct to the Registrar on April 24, 1992, the record of his criminal convictions which he had obtained from the Hamilton-Wentworth Regional Police, together with a letter in which he states: "My previous lawyer Peter Borkovitch was supposed to have my charges pardoned six years ago, but due to his mismanagement of my account failed to do so. I now plan to apply for a pardon as soon as possible."

Called as a witness by Mr. Conway on behalf of the Registrar, Mr. Peter Borkovitch, the lawyer referred to in the letter from Rados, said that the appellant's father had been a client of his for long time and he had represented the appellant in Court in June, July, August and December 1988; September 1989 and February and June 1990. He was insistent that Rados had never requested him to apply for a pardon as alleged by Rados. He said further that Rados never came to him to allege mismanagement of his account.

Gordon Randall, Registrar of Real Estate and Business Brokers, was called and dealt with the issue of non-disclosure. He pointed out that the courses in real estate required the students to be fully acquainted with the questions on the application form and that, of course, includes the question of whether or not the Applicant had been convicted of any criminal offence.

He said if the Applicant on his first application had disclosed the conviction for uttering a forged document, he still would have probably been granted registration and even on the subsequent conviction for excess alcohol (over 80) while driving, he would have been concerned, but the Applicant might still have been registered with conditions as long as disclosure had been made.

Mr. Randall observed that the offence under the Narcotics Control Act was of great concern as was the breaking and entering conviction, "His past conduct indicates to me he may not carry on business with honesty and integrity." He continued, "The offences span a variety of activities over 14 years. The disrespect and disregard for the law and the failure to disclose is of grave concern to me and my office. It is an indication of lack of integrity."

On cross-examination, Randall said the real estate course required a 70% attendance rate and 10% of the material dealt with the application. Asked if he was acquainted with Adam Dopko, Randall stated that he had known him for 25 years and had no cause to doubt his judgment. Dopko is the appellant's sponsoring broker. Asked further by counsel if the appellant had no further convictions since the last one, is this favourable to his application the Registrar replied that "Not enough time has elapsed".

John Medyily, a builder of Global Homes appearing on behalf of the appellant said that he had done business with Rados for some three years and was impressed by him. His reputation as a realtor and a person is excellent, he said, and he had never had a complaint about him. He continued saying, "Nothing has ever made me question his character or reputation, but he is not sophisticated - more of a rural type."

Medyily was of the opinion that if the man did not reveal his criminal past to the Registrar, it is of no consequence as long as it does not affect his business dealings. He pointed out that possibly Rados was embarrassed about his past.

One James Pollock, who had formerly been with the R.C.M.P. also gave evidence on behalf of the appellant. He had met Rados some 15 years ago at highschool. His general reputation, he said, was that he was honest and had integrity. He observed, however, that the appellant although having good intentions acts without thinking of the consequences.

Adam Dopko, the appellant's broker said he has employed him for ten years since 1983. It appears, however, that Rados was really only a part-time employee. On every occasion, his real estate transactions were supervised by Dopko who said he needed supervision because he was not a quick thinker, nor is he articulate. He had no problem, however, with his honesty and integrity.

The father of the appellant said in evidence that he had three farms and that he was also a builder. Much of his business appears to be managed by the son.

Dennis Rados is 32 years of age. He has been registered as a salesman under the Real Estate and Business Brokers Act since 1983 with Adam Dopko as his broker and has continued to be with him ever since. He said in evidence that he thought he had answered the questions truthfully on his application since for example, in the over 80 charge, he only had received a ticket. He continued saying that if he put down "No" to the question on convictions if he was wrong they would tell him. On cross-examination, however, he said,

"I am trying to figure out myself why I did not answer the question 'Yes'. And to a further question, he said, "I think I understood the question in 1991 better than in 1985."

It is clear that Rados has been truthful neither to the Registrar nor to this Tribunal to whom he comes for relief. He has given various explanations of why he did not disclose his criminal convictions. Possibly to him they all have merit. To this Tribunal, they are devious attempts to avoid his lack of honesty and are without credibility. He now appears before us with 29 convictions over the past 13 years. Ten of these convictions are under the Criminal Code and one under the Narcotics Control Act. Compounding that is the fact that few of these convictions had been disclosed on his applications for registration. The Registrar has pointed out that his office cannot screen all applicants and, therefore, depends on the Applicants's honesty and integrity to disclose what is asked and required under the Act. Can this Tribunal now say the Registrar is wrong? Re: Brenner (1971-1989 CRAT SCO Decisions and Orders, Volume 19). We think not. Can this Tribunal favour the evidence of a man who advances the specious or devious explanations for his conduct and excuse it on what is termed as his lack of sophistication?. We think not.

If the words honesty and integrity as provided in the Real Estate and Business Brokers Act are to mean anything, they demand of this Tribunal its full recognition of that meaning. We find in Mr. Rados neither honesty nor integrity, the cumulative effect of his convictions and lack of disclosure being that inescapable conclusion.

Therefore, by reason of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Registrar is directed to carry out his Proposal.

SHIPRA RANA

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding
ANNE L. SONE, Vice-Chair as Member
JOYCE YASINCHUK, Member

APPEARANCES:

JOHN E.F. GIBSON, representing the Applicant

GAIL MIDANIK, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF
HEARING:

10 February 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar of Real Estate and Business Brokers, to refuse registration to the Applicant, Shipra Rana, to trade in real estate as a salesperson.

Principally, the Registrar alleged that Shipra Rana's application should not be considered by the Registrar because she has failed to meet the requirements of section 10 of the Act, in that her further application for registration has not been made upon new or other evidence or where it is clear that material circumstances have changed.

For ease of reference, section 10 of the Act is set out below:

A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

The basic facts, which are not in dispute and are set out in the Registrar's Proposal, are as follows.

Shipra Rana was first employed as a real estate salesperson with Re/Max West Realty Inc. from January 24, 1984 to February 12, 1985 and from June 1, 1985 to August 3, 1986. From February 13, 1985 to May 31, 1985 she was employed with Westway Realty Limited. On August 25, 1986 she changed her employment to Miracle Realty Ltd. and later to Re/Max Premier Realty Inc. until January 24, 1990 when her registration was terminated for failure to file an application for renewal.

On February 3, 1988, December 13, 1989, and May 10, 1990

the Registrar gave notice that he was proposing to revoke and refuse the registration of Shipra Rana as a salesperson. A hearing regarding these Proposals was held before this Tribunal, and by Decision and Order dated January 9, 1991, the Registrar was directed to carry out his proposal to refuse to renew Shipra Rana's registration as a real estate salesperson.

On March 8, 1991, Shipra Rana applied for re-instatement of registration under the sponsorship of Century 21 Marquis Realty Ltd. On May 14, 1991, the Registrar's office advised Shipra Rana by letter that the Registrar was not in a position to consider her application because it did not conform with section 10 of the Act.

On August 22, 1991, Shipra Rana again applied for reinstatement under the sponsorship of Century 21 Marquis Realty Ltd. With that application, Shipra Rana advised the Registrar that she was in the process of having her name changed to her maiden name.

On November 21, 1991, Shipra Rana submitted a notice of change of sponsoring broker to Re/Max West Realty Inc., followed by an application for re-instatement under the sponsorship of Re/Max West Realty Inc. The application contained a letter from her sponsoring broker requesting a second chance for Mrs. Rana. Also attached to the application was a petition for divorce by Shipra Rana, dated November 19, 1991, from Mr. Shan Rana.

Mr. Shan Rana was subject to a Decision and Order by this Tribunal, dated January 28, 1992, directing the Registrar to refuse his registration. Initially, in the proposals dated February 3, 1988, December 13, 1989, and May 10, 1990, both Shipra Rana and Shan Rana were proposed on the same grounds. However, in September 1991, Shan Rana requested that he be heard by the Tribunal separately from his then wife, Shipra Rana, which request was granted.

At the commencement of this hearing, counsel for the Registrar argued that there was no evidence upon which the Registrar could rely to show that the test of section 10 had been met. In the Registrar's view, the mere passage of time, Shipra Rana's divorce from her husband and a letter of reference from the Mayor of Etobicoke were not new or other evidence.

Counsel for the Registrar referred to the following passage from the Tribunal's previous decision regarding Shipra Rana, dated January 9, 1991:

In conclusion, we are troubled by the

complete lack of remorse exhibited by the appellant and her apparent failure to understand or appreciate that her conduct in these transactions contravenes the most fundamental provisions of the Act - those dealing with honesty and integrity.

The Tribunal's previous decision regarding Shipra Rana dealt with her failure to disclose, fraud, dishonesty and forgery. It concerned two cases where Shipra Rana had among other things purported to buy properties on behalf of her father without disclosure of her interest or status as a real estate agent. In one transaction, the purchase price was altered and financing was obtained for more than the amount of the purchase price. In the other, the broker was deleted from the Agreement of Purchase and Sale and the Vendor could have been liable for commission to the broker, who was her employer.

Counsel for the Applicant argued that material circumstances had changed given the following: firstly, Shipra Rana was now divorced and free from the influence of her husband; secondly, she was remorseful; and thirdly, she understood the error she made in the transactions in 1985 and 1986.

The Registrar of Real Estate and Business Brokers, Mr. Gordon Randall, testified that he was looking for conduct over a period of time during which individuals proved that they were capable of conducting themselves honestly. In the Registrar's opinion, in order to practice in a regulated industry, it would be necessary for Shipra Rana to exhibit a degree of conduct and a level of integrity that was improved. For example, she would need to work at a bank or as a bookkeeper for a mortgage broker.

Furthermore, a letter of reference from the Mayor of Etobicoke on behalf of Shipra Rana, on its own, would not cause the Registrar to reconsider her registration. The Registrar also gave little weight to a letter from her sponsoring broker requesting a second chance for Shipra Rana. The Registrar noted that Mr. Colatosti, the sponsoring broker, testified at the previous Tribunal hearing that as a broker he would never hire any sales person with Shipra Rana's business practices.

The Registrar took the position that Shipra Rana had an understanding of what happened and was responsible for her past misconduct, despite the forceful personality of her then husband, Mr. Shan Rana.

Although, the Applicant's remorse, if sufficient, might

be relevant under section 10, the Registrar stated that Mrs. Rana did not appear to understand that what she had done flew in the face of the legislation and expectations of conduct for a real estate agent. There was consumer harm due to falsification of mortgage documents to the detriment of lenders and depositors. Her failure to disclose her status as a real estate agent to the vendor was a breach of the Act. There was also an element of fraud. Her previous misconduct was extremely offensive to the Registrar. In the Registrar's opinion, the onus upon Mrs. Rana under section 10 had not been met.

Shipra Rana testified that she was born in New Delhi, India and that she married in September 1972 to Shan Rana. At that time she was 22 years old and he was 36. The marriage was arranged by their parents. In October 1972 they emigrated to Canada. The couple subsequently had three children. She stated that she had obtained her real estate licence on January 24, 1984. She worked at various brokerages with her husband until March 13, 1987.

She stated that their family was an orthodox Indian one. The husband was the master. The wife had to be submissive and no matter what was an inferior person. Her husband's word was law in the house even regarding food, television and the books that the children were allowed to read.

As a real estate agent, she said she worked in the background, did cold calling, set up appointments and did extra paperwork. She did not work on deals independently of her husband, who was more experienced in business.

Shipra Rana testified that she did not dispute the Tribunal's decision, dated January 9, 1991. She understood what was wrong and was very sorry. She said that she did ask Shan if disclosure was required to the vendor because that is what she had learned in the real estate course. However, he said that because it was her father who was involved (as purchaser) she did not have to do that. She said her error was following Shan's orders. If she could turn back time, she knew she would have done it differently. Her lack of understanding the situation caused two vendors pain, wasted a lot of time and they lost money. She said that she had suffered a lot because of that mistake.

She further stated that she did not tell the previous Tribunal that she regretted her mistakes because she was scared of Shan Rana. At that time, she had just separated from her husband. However, she stated she did feel remorseful after the Tribunal hearing, at her meeting with the Registrar in February 1991, to discuss her re-application.

She stated that she moved to Re/Max Premier in 1987 because her husband's working practices did not seem right to her. She stated that she worked on her own competently and honestly. In 1988, she was one of the top 10 real estate salespersons in Ontario. There were no complaints at Re/Max Premier against her.

Carol Spencer, a salesperson with Re/Max West Realty for over two years, testified on the Applicant's behalf as she had done at the previous Tribunal hearing. She had obtained her real estate licence in 1986 and had worked closely with Shipra Rana for about a year and a half at Re/Max Premier. She stated that Shipra Rana operated very ethically. She was not aware of any complaints about Shipra Rana's work. During this time, she believed that Shipra Rana did not purchase any property on behalf of a relative. She acknowledged the statement on page 4 of the previous Tribunal decision:

Carol Spencer, a real estate agent for three years, has known Mrs. Rana for the past two years and says she has been a good person to deal with and particularly good with clients. She pointed out that these transactions were, in her opinion, out of character.

Carol Spencer stated that one of the opportunities that Shipra Rana had for unethical conduct was putting deals through without the broker's knowledge. She admitted that she was surprised that this was one of the Tribunal's findings in the past.

She also admitted that she was close personal friends with Shipra Rana and that Mrs. Rana had introduced her to her clients, but stated that she had not paid any compensation for the client list.

Counsel for the Applicant in his final argument stated that Mrs. Rana admits her conduct as a real estate salesperson was a serious breach; she feels remorse and is anxious to conduct herself with integrity. She now understands the importance and purpose of complying with the provisions of the Act. At the time she was dominated by her husband and she permitted her judgement to be impaired.

Shipra Rana testified that she obtained a divorce in September 1992 from Shan Rana. She has no relationship with him, financial or otherwise. She has not remarried and is the sole support of three children. She is currently on welfare.

Counsel for the Applicant concluded by arguing that she does not pose a threat to the public, she has learned her lesson and been punished. She is willing to abide by any terms of probation, monitoring or requirements for further education.

Counsel for the Registrar argued that if this Tribunal did find that Mrs. Rana had provided sufficient evidence to pass the threshold test in section 10, the Registrar was opposed to Mrs. Rana's registration upon conditions or otherwise, under section 6 of the Act. The Registrar took the position that the Applicant's past conduct affords reasonable grounds for belief that she will not carry on business in accordance with law and with integrity and honesty. Due to the findings of this Tribunal, we do not find it necessary to elaborate on this argument.

Upon all the evidence, this Tribunal finds that the requirements under section 10 of the Act have not been met by the Applicant. What is required is "new or other evidence" or a clear change in material circumstances. According to the Shorter Oxford English Dictionary, "material" means:

Of such significance as to be likely to influence the determination of a cause, to alter the character of an instrument etc."

This Tribunal has no desire to re-litigate the issues of the previous decision.

We note the following passages from the Tribunal's decision of January 9, 1991:

At page 4,

It is clear Mrs. Rana, fully aware of the real estate market, stood to gain a substantial profit on that transaction. Whether or not it was under the influence of her husband is not, in our view, material.

And at page 6,

Whether or not influenced by her husband, it is clear Mrs. Rana knew she was treading on forbidden ground in becoming involved in these transactions. They cannot be rationalized or excused by the production of a power of attorney or some

evidence of her acting ostensibly on behalf of her father. She is an experienced agent, having been in the trade since 1982, and is expected to know the Act and the Regulations under which she operates.

The Tribunal concurs with counsel for the Registrar that the previous Tribunal found that Shan Rana's influence upon the Applicant's conduct as an individual real estate agent was not material. Therefore, the cessation of this influence cannot be regarded as a material change in circumstances or new and other evidence for the purposes of section 10 of the Act.

Shipra Rana's apparently honest and competent work at Re/Max Premier took place prior to the previous Tribunal hearing. In addition, Carol Spencer's testimony dealt with their working relationship prior to the previous Tribunal hearing. Accordingly, this is not new evidence because all of it was considered at the previous Tribunal hearing.

There is no doubt that Mrs. Rana feels badly about the consequences of her actions as they impact on herself and her family. However, this Tribunal did not hear persuasive evidence that she is sufficiently remorseful about the impact of her actions on others including lenders, vendors and consumers.

The Tribunal also was not persuaded that the Applicant sufficiently understands that her past conduct contravenes the most fundamental provisions of the Act relating to honesty and integrity.

This Tribunal thus cannot rule that there is new or other evidence or that it is clear that material circumstances have changed as required under section 10 of the Act. Based upon the Tribunal's decision under section 10 of the Act, there is no need for this Tribunal to deal with the merits of the application under section 6 of the Act.

Accordingly, by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse registration to the Applicant upon the basis of her re-application under section 10 of the Act.

VOGELSBERG, JOSEPH H.

APPEAL FROM A PROPOSAL
BY THE REGISTRAR UNDER THE
REAL ESTATE AND BUSINESS BROKERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding
SELWYN CHARLES, Member
A. DONALD MANCHESTER, Member

APPEARANCES:

DAVID DOWNEY, counsel representing the
Applicant

CHRISTINA CHRISTOPHE, counsel representing
the Registrar under the Real Estate and
Business Brokers Act

DATES OF 27 June and
HEARING: 4 July 1994

Toronto

REASONS FOR DECISION AND ORDER

Mr. Vogelsberg appeals a Proposal by the Registrar under the Real Estate and Business Brokers Act (the "Act") to deny him registration as a broker.

As a preliminary matter, the Proposal, dated October 22, 1990, also proposed the revocation of the broker registration of Re/Max Dynamic Realty Inc. ("Dynamic"), alleging that Mr. Vogelsberg was its controlling mind. However, counsel for the Registrar entered into evidence a Director's Certificate showing that Dynamic was no longer registered under the Act as a broker, as of November 26, 1990. Thus, the Proposal was amended at this hearing to refer only to Mr. Vogelsberg.

In his Proposal, the Registrar relied upon section 6(1)(b) and (d) of the Act, asserting that the Applicant's past conduct demonstrated that he will not carry on business in accordance with law, integrity and honesty; furthermore, he asserted that the Applicant is carrying on activities contravening the Act.

By way of a Supplemental Notice of Proposal to Revoke Registration, dated May 18, 1994, the Registrar also relied upon section 6(1)(a) of the Act, alleging that the Applicant cannot be expected to be financially responsible in his business.

To understand why this hearing comes approximately 4 years after the initial Proposal, it should be pointed out this matter was referred back to this Tribunal by the Divisional Court for further consideration. In its decision released February 7, 1994, the Divisional Court overturned the decision of another panel of this Tribunal, released October 29, 1992. The Divisional Court stated:

We...reiterate that the proper question on the rehearing remains whether the respondent has carried on activities in contravention of the Act and regulations, and whether his past conduct affords reasonable grounds for the belief that he will not carry on business in accordance with law, integrity and honesty. As the court said in Brenner, unless the Tribunal can find that conduct does not afford such reasonable grounds, the Tribunal should not order the Registrar to refrain from carrying out his Proposal.

The facts are that Mr. Vogelsberg has been registered under the Act, first as a salesperson and then as a broker, since 1979. He testified that he is currently 48 years old and resides with his family in Guelph. After enjoying success in the real estate industry, he became registered as a broker in 1988, and by the summer of 1989, he had purchased all the shares of Dynamic. He testified that he believed without verification that the trust account was in good order at the time of purchase. Later however, he said he was required to cover a trust shortage of about \$7800, which he attributed to his former partner, out of the general account. Mr. Vogelsberg's financial difficulties worsened and he said by 1989 he could not meet his expenses, could not obtain more credit and was at risk of losing his business.

The result was that Mr. Vogelsberg, together with Dynamic, were convicted in March 1991 of two offences under section 20(1) of the Act relating to trust defalcations. According to an Information entered into evidence, Mr. Vogelsberg and Dynamic were fined and convicted of improperly withdrawing \$17,000 in March 1990 and \$9,000 in August 1990 from the trust account and depositing the monies in the general account.

Ms. Jane Hutchinson, formerly Wilkins, from the Registrar's office, testified that she inspected the premises of Dynamic in September 1990 and found about 30 NSF cheques for general operating expenses had been written on the general account from January to September 1990. She also testified that she investigated and generally confirmed the trust shortages in 1990.

Under cross-examination, Ms. Hutchinson further stated that the Applicant did not attempt to hide the defalcations.

Mr. Brian Prendergast, also of the Registrar's Office, testified that he investigated the Applicant's records in 1990 and confirmed the trust shortages that formed the basis of the two convictions in March 1991, as set out in the Information.

Considerable additional evidence was presented to this Tribunal relating to the circumstances and investigations respecting trust account shortages, including the Applicant's contention that his former partner was responsible for a portion of these shortages. However, this Tribunal notes Mr. Vogelsberg's own testimony that he twice made improper withdrawals from the trust account, knowing that these actions were wrong, and further relies upon the evidence of the two convictions in March 1991, for the finding that this Applicant, in interfering with his trust accounts on at least two occasions, committed a wrongful act, namely theft.

Mr. Gordon Randall, the Registrar, testified that he viewed trust account breaches as the most serious offenses under the Act. That there was no record of consumer loss as a result of the Applicant's trust account breaches was not a mitigating factor, according to the Registrar, because consumer funds are put at risk.

The winding up of Dynamic in 1990 and the 1991 convictions for breaches of trust did not end Mr. Vogelsberg's financial difficulties. In March 1992, the Bank of Montreal entered a judgment against Mr. Vogelsberg and his wife, Marilyn, in the amount of \$6763.80 plus costs and interest. Ms. Shirley Henderson of the Bank of Montreal testified that the indebtedness was incurred through a credit card and personal overdraft. She further confirmed that this judgment remains outstanding. She stated that the Bank did not oppose the bankruptcy discharge of Marilyn Vogelsberg in 1993 but did send a garnishment notice to Mr. Vogelsberg's employer, Joe Peter Realty Ltd. in July 1993. She confirmed that the Bank has received no monies pursuant to the garnishment. She also stated that in February 1994, Mr. Vogelsberg agreed to pay \$50 per month for 6 months and towards that agreement, she has received and processed one payment only of \$250, on May 31, 1994.

Mr. Vogelsberg did not dispute the testimony of the Bank's representative respecting this outstanding judgment. Under cross-examination, he stated that he was unable to work out a deal with the Bank. He further stated that his single payment of \$250, made to the Bank in late May 1993, was "coincidental" to the issuance of the Supplementary Proposal on May 18, 1994, which put this outstanding judgment into issue.

Mr. Vogelsberg further stated that he has been working on a commission basis as a real estate salesperson for Joe Peter Realty since May 1992. He testified that he currently earns about \$40,000 - \$50,000 per annum. However, he has support obligations and states that his finances continue to be "tight".

Mr. Randy Persaud, of the Registrar's Office, testified that pending a decision by the Tribunal, Mr. Vogelsberg's registration as a real estate broker has been subject to terms and conditions. In particular, Mr. Vogelsberg has not been permitted to have signing authority in relation to any account into which monies were deposited respecting any real estate transaction.

According to Mr. Gordon Randall, the Registrar, no consumer claims have been made against Mr. Vogelsberg since the imposition of terms and conditions. The Registrar stated that he interviewed the Applicant in early 1994 who forthrightly disclosed his financial status. The Applicant advised him that he had earned about \$20,000 in 1992, which increased to about \$50,000 by 1993.

Mr. Joseph Peter, a broker since 1970 and the Applicant's employer, also testified that there have been no consumer complaints and "no problems" with the Applicant's employment. As well, he testified that the Applicant advised him that the garnishment notice from the Bank of Montreal could be ignored because a deal was being worked out.

In addition to financial problems, Mr. Vogelsberg had other difficulties, evidenced by a certified copy of his driving record. Beginning in October 1977 and continuing until November 1984, Mr. Vogelsberg was convicted of 3 drinking and driving offences under the Criminal Code. In October 1977, he was convicted of impaired driving and his license was suspended until January 20, 1978. In October 1978, he was again convicted of impaired driving and lost his license for a year until October 1979. In November 1984, he was convicted of driving "over 80", and lost his license until February 1985.

In May 1992, Mr. Vogelsberg was again charged with "over 80" under the Criminal Code. At the time of this hearing, proceedings were still pending, with a return date in August 1994.

In addition to these drinking and driving offenses, Mr. Vogelsberg has been convicted of 5 speeding offenses from August 1981 until September 1991, and one offense in November 1991 of having a radar warning device in his car.

The convictions, the Registrar noted, occurred over a 15-year period. He agreed that some of the convictions are dated, for example, the driving convictions from 1977-79, and would not alone

support revocation of the Applicant's registration. However, the continuing nature of the convictions showed the Applicant's disregard for the law and a disregard for the safety of others, in the view of the Registrar.

However, the Registrar testified that he was more concerned that the Applicant failed to disclose to him on various applications from 1979 until 1994 the existence of these past convictions, the 3 suspensions of his driver's license, his 2 convictions under the Act for breaches of trust and the outstanding Bank of Montreal judgment.

Specifically, Mr. Vogelsberg answered "no" to the question directed to obtaining information about convictions or pending charges on his applications in 1979, (on Form 4) in 1981, 1983, 1985, 1987, 1988 (for his broker's registration), 1990 and in 1992. Mr. Vogelsberg also failed to disclose the 3 driver's license suspensions, which occurred in 1977, 1978 and 1984, in response to a question directed to eliciting that information, on his applications in 1979, 1983, 1985, 1987, 1988, 1992 and 1994. After the Bank of Montreal obtained judgment against him, in March 1992, Mr. Vogelsberg answered "no" to the question asking if any unpaid judgments exist, in his 1992 and 1994 applications. Mr. Vogelsberg also failed to disclose his 1991 convictions under the Act for breaches of trust on his 1992 application.

However, in his renewal application dated April 4, 1994, Mr. Vogelsberg answered "yes" to the question respecting convictions and pending charges. However, he failed to provide any particulars; when requested to do so, he referred to this pending Tribunal hearing, according to Mr. Persaud of the Registrar's Office.

The Registrar thus took the position that Mr. Vogelsberg failed to disclose, on his 1994 renewal application, his 2 convictions under the Act for breaches of trust, his 3 convictions under the Criminal Code and his pending charge of "over 80" under the Criminal Code, his 5 speeding convictions and a conviction for having a radar device in his motor vehicle, his 3 driver's license suspensions and the outstanding judgment against him.

Mr. Vogelsberg testified that he failed to disclose his 3 criminal convictions, his pending criminal charge and his license suspensions because he was "embarrassed". He offered as explanation that the 1977 and 1978 impaired driving offenses occurred during a period of marital breakdown. He also stated that he did not view his convictions as relevant to his work.

Respecting his 1994 application, he did not disclose his 2 convictions under the Act for breaches of trust because, in his

opinion, the Registrar already knew of them. He agreed that the question seeking full particulars about "an offence under any law or any pending charges" does not exclude his "speeding tickets". He further stated that he did not request any assistance in completing these applications or meeting his disclosure obligations under the Act. He agreed that he gave false information on his applications under the Act.

Counsel for the Registrar reminded the Tribunal that the Divisional Court directed this Tribunal to put its mind to the "proper questions", that is, the three statutory grounds for the revocation of the Applicant's registration, as detailed in the Proposal and Supplementary Notice, and set out under section 6(1)(a), (b) and (d) of the Act.

This Tribunal then poses the following questions:

- 1) Having regard to his financial position, can Mr. Vogelsberg reasonably be expected to be financially responsible in the conduct of his business?
- 2) Does the Applicant's past conduct afford reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty?
- 3) Is the Applicant carrying on activities that are, or will be, if he is registered, in contravention of the Act or the regulations?

In response to the first question, this Tribunal has considered the uncontroverted evidence that the Bank of Montreal obtained judgment against Mr. Vogelsberg approximately 2 years ago, in the amount of about \$6800 plus interest. The Tribunal agrees with counsel for the Registrar that the Applicant has been either unwilling or unable to make a significant effort to pay this debt. The Applicant testified that his current finances are "tight". The evidence has also established that when Mr. Vogelsberg ran into financial difficulties in 1990, he breached his trust account obligations and put consumer funds at risk.

This Tribunal also notes that the Applicant's single payment made towards this unpaid debt coincided with the Supplementary Proposal, which put this indebtedness into issue. In the view of this Tribunal, this past conduct puts in issue the Applicant's honesty and integrity.

This Tribunal agrees with the Registrar that the Applicant's two convictions for breaches of trust under the Act are of the gravest concern. As counsel for the Applicant conceded, these breaches of trust are established clearly by the record of

convictions and are admitted by the Applicant to be wrongful acts.

However, counsel for the Applicant argued that these trust account breaches do not evidence moral turpitude; these offenses, he argued, demonstrate the Applicant's lack of skill as an unsupervised broker trying to operate within the "mess" that Dynamic was.

This Tribunal disagrees. Whether or not the Applicant was an unskilled businessman at the time he purchased Dynamic, with its alleged trust shortages, he must assume responsibility and culpability for the defalcations that support his convictions under the Act.

Additionally, this Tribunal notes evidence that the sponsoring broker, Mr. Peter, has apparently relied upon the Applicant's assurances to ignore a year-old garnishment notice from the Bank of Montreal. This garnishment, which has produced no disbursements, took effect during a period when, according to Mr. Vogelsberg, he was earning about \$40,000 - \$50,000 per annum.

Furthermore, this Tribunal agrees with counsel for the Registrar that the Applicant's relevant past conduct includes his numerous and continuing driving convictions and his ongoing failure to disclose all relevant information to the Registrar, as he is obligated to do.

Counsel for the Applicant argued that Mr. Vogelsberg's past conduct, particularly the trust account breaches, simply demonstrates that this Applicant does not have what it takes to function independently as a broker. Mitigating factors, include evidence that some of the convictions took place during periods of high personal and economic stress and that full disclosure has now been made.

As well, he argued that evidence exists that Mr. Vogelsberg has changed. He pointed to the Applicant's apparently problem-free employment as a real estate salesperson with Mr. Peter, who has agreed to supervise the Applicant with the help of the Registrar. Counsel contended that Mr. Vogelsberg can continue productively as a real estate salesperson under terms and conditions, as he has done in the past. The concerns of the Registrar, he argued, are absent if the Applicant is regulated properly as a salesperson under the Act.

The Registrar, however, was of the opinion that continuing terms and conditions are inappropriate in what is essentially a self-regulating industry. He agreed that the Applicant has evidenced in the past some capacity for compliance to specific terms and conditions, designed to regulate his conduct,

pending a Tribunal decision. However, in his view, salespersons deal with members of the public and their funds and thus, like brokers, must be capable of self-regulation.

Counsel for the Registrar pointed out that the statutory obligations and standards of conduct are the same for salespersons and brokers under the Act. She argued that if the Applicant is clearly disentitled upon the evidence to function as a broker, he is also disentitled to be registered as a salesperson.

This Tribunal finds that the Applicant's past conduct, which includes 2 convictions under the Act for breaches of trust, numerous and continuing driving convictions that show a disregard for the law and public safety, and the Applicant's repeated failure to disclose this relevant past conduct to the Registrar, all afforded the Registrar reasonable grounds for the belief that this Applicant will not carry on business in accordance with law and with integrity and honesty.

Furthermore, this Applicant has carried on activities that are in contravention of the Act or the regulations, as evident in his 2 convictions for breaches of trust and his repeated non-disclosure to the Registrar of requisite information.

Finally, having regard to the Applicant's currently strained financial position, and his past business conduct when financially stressed, this Tribunal finds that the Registrar had reasonable grounds to expect that this Applicant cannot be financially responsible in the conduct of his business.

The Tribunal finds that the Registrar has sufficiently established his case against the Applicant upon all three statutory grounds. Viewing the evidence cumulatively, the Registrar had more than reasonable grounds to issue a Proposal to revoke the registration of Mr. Vogelsberg as a broker under the Act.

Furthermore, we agree with counsel for the Registrar that the same evidence that so strongly disentitles this Applicant to remain registered as a broker also goes against his registration as a salesperson, subject to terms and conditions. Mr. Vogelsberg has demonstrated that he has substantial difficulty in the past complying with other legal obligations, evident in his driving record, his record of non-disclosure to the Registrar, his debt-repayment record, and his 2 convictions for breaches of trust.

Therefore, by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to revoke the registration of the Applicant as a broker under the Act.

ADVENTURE TOURS

APPEAL FROM A DECISION OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding

APPEARANCES:

GREGORY SCOTT, agent for the Applicant

SUSAN CAMPBELL, representing the Board of Trustees
of the Ontario Travel Industry Compensation Fund

DATE OF

HEARING: 28 June 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund at a meeting held on February 22, 1994 and reported to the Applicant by a letter dated March 4, 1994. Adventure Tours is a travel wholesaler registered under the Ontario Travel Industry Act and, as such, a participant in the Travel Industry Compensation Fund. It did business over a period of time with a company called Travel Deals Inc., which was a registered travel agent in Ontario and a participant in the fund. This agent specialized in last minute travel deals with discount rates and did most of its business over the telephone.

The practice followed with most, or perhaps all, of the business was that prospective customers would telephone Travel Deals and, if that agent could offer them travel packages which they wanted, Travel Deals employees would take an order there and then on the telephone and fill out a printed form with Travel Deals name at the top. This form provided for details of the customers or passengers (name, address, telephone, etc.), details of the travel package and details of the costs involved. The employee taking the information would then get particulars of a credit card from the customer to cover the charges so that they could go ahead and place the booking with the wholesaler at once. Details of this credit card were noted at the bottom of the form. In some instances, the customer would come in to Travel Deals office very shortly - later that same day or perhaps the next day and cover the payment with cash or a cheque. In other cases, the credit charge would be put through and payment received from the credit card issuer in that way. Because of the urgency involved, Adventure Tours would issue the tickets and forward them to Travel Deals so that the customers could get them and travel. Adventure Tours

would then send Travel Deals an invoice for charges incurred from time to time.

Travel Deals got into financial difficulties and closed up its business on April 15, 1993. The Claims Manager of the Travel Compensation Fund, Nancy Rossi, who gave evidence at the hearing said that large losses were suffered from this failure and that the fund had already paid out over \$1,700,000 in claims arising from it. Adventure Tours initially filed a claim on May 5, 1993 for \$43,344.13. The Claims Manager said that these claims as with all others received as a result of the failure of this agent were divided initially into four categories.

1. Claims for payment of invoices from Adventure Tours to Travel Deals for travel packages for customers who had not yet travelled and whose destination was imminent - The Board of Trustees treated those with departure dates from April 15 to April 25 as falling in this category. For these, the Board gave an automatic guarantee to the wholesaler, in this case, Adventure Tours, so that the customers could travel.

2. Claims for payment of sums still required for travel services for customers who were in transit at the time, and for whom additional costs had yet to be paid, mostly to get them home. For these, the Board also gave a guarantee so that they could finish the trip for which they had paid Travel Deals and get home.

3. Claims for customers who had paid for trips to commence in the future on or after April 26. For these, the Board of Trustees determined that the customers should file their claims as such in the regular way as provided in the Regulations.

4. Old claims by travel wholesalers such as Adventure Tours in this case, for travel which had taken place prior to April 15 and for which the wholesalers had not received payment from Travel Deals.

When the Board of Trustees received the Applicant's claim on May 12, 1993 for \$43,344.13 it found that \$16,559.04 thereof fell within the first or perhaps the first and second categories above mentioned and allowed the same at a meeting on August 31, 1993. On September 15, 1993, the Compensation Fund advised Adventure Tours of this, enclosed a cheque for \$16,559.04 and advised that the balance of \$26,785.09 was deferred to provide Adventure Tours with some time to meet requirements of section 15(3) of the Schedule establishing the Terms of the Compensation Fund which reads:

15(3)- Where a participant who is a travel wholesaler has acted in good faith and at arm's length with a participant who is a travel agent and

the travel agent has failed to pass a client's money to the travel wholesaler and the travel wholesaler has, at the travel wholesaler's own expense, reimbursed the client or has provided the travel service contracted for but not paid for by the travel agent to the travel wholesaler the travel wholesaler shall be entitled to claim for the refund of that portion of the client's money received by the travel agent that the travel agent failed to pass to the travel wholesaler, but in no event shall the travel wholesaler be entitled to claim any portion of such money that represents commissions.

In this case, the Compensation Fund never questioned that Adventure Tours was a travel wholesaler who was participant in the fund, that Travel Deals was a travel agent or that Adventure Tours had, at its expense provided the travel services in question to the customers. What the Compensation Fund did question was, in the case of each customer, was Adventure Tours able to prove that the clients had paid the money in the first place to the agent with whom they dealt, Travel Deals. The Compensation Fund took this position for two reasons. In the first place, the onus of bringing its claims within the provisions of the section of the Regulation is always upon the claimant. It must always do this upon a balance of probabilities upon admissible evidence in order to succeed. In the second place, the Claims Manager of the Fund told the Tribunal that the extensive examination which it had made of Travel Deals' books and records and of its affairs generally had shown that Travel Deals' records were not always accurate or reliable.

When it received the letter of September 15, 1993, Adventure Tours proceeded to try and get proof that the customers or clients of Travel Deals had paid the additional \$26,785.09 to Travel Deals. This total was made up of claims involving 19 files for individual travellers. Adventure Tours wrote registered letters to these 19 persons. Of these, they received six responses (covering eight passengers) from persons who helped them and provided the necessary evidence, seven responses from persons who stated that they would not assist them and there were six from whom they received no response and concerning whom they made further efforts by telephone and otherwise to locate but without avail. Adventure Tours then provided to the fund the results of these efforts.

Mr. Scott, who gave the evidence at the hearing on behalf of the Applicant, described the evidence eventually provided to the fund in response to its request. It included a copy of the printed sheet filled out by Travel Deals described above, with a copy of Adventure Tours's invoice to Travel Deals for that particular transaction for all but about \$4,000 worth of the claims and also

the documentation received from the six persons who responded positively to the enquiry.

From this material, the Compensation Fund was able to identify five transactions in which it was indicated that the clients paid the accounts in cash to Travel Deals and a sixth transaction in which about one-half was paid in cash and the other half on a Visa credit card. These transactions covered eight passengers as two of them were for two passengers each. The Compensation Fund prepared a spread sheet with information concerning these transactions which showed a net claim for Adventure Tours upon the cash transactions for \$3,409.28 (See document 8 of Exhibit 5). The Board of Trustees reasoned that the Applicant could not get any further documentation or produce any more paper trail concerning these and, therefore, allowed this additional claim of \$3,409.28 as complying with the requirement of the Regulations, but disallowed the rest including the one-half of the payment on Document 8 which was shown as paid with the Visa card.

The basis of this decision was explained to me as being that the Applicant could not get anything more on the cash transactions so they would not require anymore more, but it would be possible to get more documentation on the credit card or cheque transactions and, therefore, they would require the same.

I have some difficulty with this line of reasoning. In the first place, if the onus is on the Applicant to meet a certain requirement and it fails to do so, the reason should make no difference unless in some way it is the fault of the party which established the requirement. To do otherwise is to have a separate requirement for each situation and section 15(3) of the Schedule has nothing of this kind. In the second place, no question was raised of the clients having received a receipt for the cash paid. Few knowledgeable and prudent persons hand over hundreds or thousands of dollars in cash to Third Parties without getting a written receipt for it. If the Compensation Fund applied the same tests and requirements to all transactions (as section 15(3) of the Schedule would seem to require), there appears to be a real inconsistency here. In the third place, the only legal basis which I can see for the making of the distinction which the Compensation Fund has made here was upon the application of the best evidence rule which requires that a party, with the onus of proving something, must produce the best evidence available to do so and will fail if he tries to rely on some other evidence which is not the best evidence available.

The best evidence rule is not a binding requirement of substantive law (like the provisions of the old Statute of Frauds), nor is it a rule upon which the party requiring the proof to be

made can set arbitrary parameters. It is up to the Court or Tribunal trying a case to decide what these should be. Furthermore, the best evidence on a particular point is not what might theoretically be the best evidence but rather what, upon the facts and circumstances of a particular case, is the best evidence available and the onus upon the party with the burden of proof is to take all reasonable steps to produce such evidence. If he fails to do this, the point should probably be decided against him. However, if he does this and is unable to produce any more evidence than that which he tenders, then the trier of fact must look at all the evidence before it and determine, on a balance of probabilities, which is the more probable conclusion to be drawn on the point.

In his testimony, Mr. Scott told of the efforts made by the Applicant to get the assistance of the nineteen clients of Travel Deals in obtaining documents in corroboration of these claims. The fact that seven of them, when contacted, refused to do anything provides a sad commentary upon an increasingly prevalent attitude in our society. The fact that six of them could not be found at addresses given less than two years before and by people in a position to take trips such as those indicated, provides a different commentary upon the mobility of our society and the fact that no one took steps to have the letters forwarded. Considering the evidence on this point, I find that the Applicant did take, in the circumstances, reasonably the steps required of him to find the better evidence (in which it succeeded in six cases) and, therefore, its claims for the remainder should not fail simply upon the application of the best evidence rule. I must, therefore, look at the evidence with regard to these claims and determine on a balance of probabilities whether I can conclude that the clients paid Travel Deals in these transactions or not.

A further review and consideration of the relevant documents now available led Nancy Rossi, the Claims Manager of the Compensation Fund, who gave evidence at the hearing and counsel for the fund to the conclusion that, in addition to the two cheques already paid, a further sum of \$5,401.68 should be allowed but, on the other hand, the remainder of the claim should be reduced by \$901.46 because this was a claim for a client named Easterbrook, shown in the material filed which was actually included in the sums already paid. Ms. Campbell said that she believed she was right in this last conclusion but, if perchance it should be shown otherwise, the fund would add this amount of \$901.46 to the remaining payment it should make.

We are now, therefore, looking at the following amounts:	
Original claim	\$43,344.13
Amount paid on Sept.2/93	<u>16,559.04</u>
Balance then claimed	26,785.09

Amount paid on Feb.25/94	<u>3,409.28</u>
Balance now claimed	23,375.81
Further amount conceded by respondent	5,401.68
Balance still in dispute	<u>17,974.13</u>
Amount which should be deducted for Easterbrook transaction	<u>901.46</u>
Remaining amount	\$17,072.67

It is this sum of \$17,072.67 at which the Tribunal must now look and determine upon a balance of probabilities on all of the evidence before it whether it is more probable that the clients did pay, or did not pay these monies, or part of them to Travel Deals.

In his evidence to the Tribunal, Mr. Scott on behalf of Adventure Tours said that the Applicant had provided as part of its supporting documentation to the Compensation Fund, a document similar to Document #9 in Exhibit 5 for the Auerbach transaction for all of the transactions included in the claims except about \$4,000 worth of the claims which were not paid. No issue was taken on behalf of the Respondent with this estimate in cross-examination or otherwise. With each of these documents, which came from Travel Deals files, was also a document similar to Document #10 in Exhibit 5 from Adventure Tours files showing details of the passengers, the bookings made, and the invoice therefor to Travel Deals for the price thereof. Also attached were copies of documents similar to Document #11 which is a flight manifest from Adventure Tours files showing the name of the passenger or passengers on the flight shown as booked on Document #10 and the similar document in each case. We have the additional evidence of Mr. Scott that Adventure Tours did in fact pay out all of the money to the airlines or otherwise for the tour packages and provided the tickets and bookings to Travel Deals for its clients.

In addition to the foregoing evidence submitted to the Compensation Fund before Adventure Tours took the steps which it did to get corroboration from the clients of Travel Deals, we have the results of those efforts. In the six cases where a response was obtained, the corroborative evidence was forthcoming. Exhibits 6A and 6B are examples of this. In Exhibit 6A, the client, Rogovsky produced a copy of a Bank of Montreal Mastercard Statement showing the monies in question paid to Travel Deals as indicated. In Exhibit 6B, the client, Allen, produced copies of Visa slips showing the monies paid as indicated. It was agreed that the rest of the six who responded equally corroborated the earlier produced documentation. It is to be noted that there was nothing in the cases of the six who could not be found or the seven who would not help to raise a doubt that they were in some way different.

Upon all of this evidence, I must find that it is more

probable that these other clients from whom no corroboration was received did pay the money to Travel Deals than that they did not. In coming to this conclusion, I am not unmindful of the evidence of Ms. Rossi that the Compensation Fund did not find the bookkeeping and record keeping of Travel Deals to be always accurate or reliable. However, when all of the evidence relevant to this case is examined, I find the probability to be that these monies were paid.

There is, however, one other matter which should be taken into consideration. I was able to observe the demeanour of Mr. Scott and the manner in which he gave his evidence and form an opinion of his understanding of the matters with which he was dealing. I have no hesitation in saying that I am satisfied that he was an absolutely honest and trustworthy witness. His giving of the evidence with regard to the lack of the documentation to support \$4,000 worth of the claim supports this conclusion. He gave this evidence in chief himself, not in response to cross-examination.

Such, however, will not always be the case with persons trying to recover money upon less than all of the possible evidence in support of their claims and the Tribunal should be very careful in setting precedents in this regard. No explanation was offered as to why, with regard to the approximately \$4,000, this documentation was not available. It is one thing to find with regard to all of the rest of the claim, concerning which all of the documentation I have described was produced, that the probability is that the money was paid and that the requirement of the Regulation has been met in this particular case. Concerning the clients for whose transactions this documentation from Travel Deals files was not produced, I cannot have the same level of satisfaction that the onus has been met and I am not prepared to direct the Compensation Fund to pay these claims. In assessing exactly what should be paid, I have the difficulty that the evidence as to the amount to be disallowed on this basis, indicates only about \$4,000. There are several ways the Tribunal might deal with this problem, but I think it best to make a final determination of all of the issues as best can be done on the evidence presently before me. As noted above, the final amount in question was \$17,072.67 and I will reduce this by \$4,072.67 as being "approximately \$4,000" and add \$13,000 to the amount yet to be paid. To this must be added the \$5,401.68 as set out above for a total of \$18,401.68.

Therefore, pursuant to the authority vested in it by the provisions of section 17(3) of the Schedule under the heading "Terms of Compensation Fund" aforementioned, the Tribunal directs the Board of Trustees of the Ontario Travel Industry Compensation Fund to pay to the Applicant \$18,401.68 and otherwise to disallow this claim.

AHMAD, MRS. AHLAM ABOUD
 joined with
 JAKU, MR. TONIN

APPEAL FROM A DECISION BY THE
 BOARD OF TRUSTEES UNDER THE
 TRAVEL INDUSTRY ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES: MR. SALAH SCHUBLER, representing the Applicant,
 Mrs. Ahlam Aboud Ahmad,
 MR. TONIN JAKU, on his own behalf,
 MS. SUSAN CAMPBELL, counsel representing the
 Board of Trustees

DATE OF

HEARING: 4 May 1994 Toronto

REASONS FOR DECISION AND ORDER

As a preliminary matter, all parties agreed that the legal issues shared in the two appeals were so similar that these matters should properly be heard together.

The principal legal issue in both appeals is whether the Travel Industry Act allows compensation for the cost of the alternate travel arrangements that both Applicants were required to make, when JAT Yugoslav Airlines ceased operations.

Mrs. Ahmad, because of language difficulty, presented her evidence through her representative, Mr. Schubler, who testified on her behalf. No objection was made by counsel for the Board of Trustees of the Ontario Travel Industry Compensation Fund.

The evidence was that Mrs. Ahmad purchased 3 round-trip tickets to travel to Teheran in the spring of 1992 with her two children. She paid the amount of \$2740 (including \$80 in taxes) for these 3 round-trip tickets on JAT Yugoslav Airlines. Upon her arrival in Teheran, JAT suspended operations in Canada, thus delaying Mrs. Ahmad for a month and forcing her to arrange alternate travel to return home. As a result, Mrs. Ahmad paid \$2743 in U.S. funds for 3 one-way tickets from Lufthansa to fly home with her children.

Mrs. Ahmad thus claimed \$3413.88 (Canadian) from the Fund to compensate her for the cost of these alternate travel arrangements. The Board of Trustees, in a letter dated December 24, 1992, decided that only the amount of \$1330.00 was compensable.

This amount represented half the value of the original round-trip tickets purchased by Mrs. Ahmad from JAT.

Mrs. Ahmad thus appeals that decision to deny the balance of her claim for compensation, being the amount of \$2083.88. Her representative stated to the Tribunal that the Ahmad family, which is supported by welfare, can ill afford this financial loss.

The evidence of Mr. Jaku was that he purchased one round-trip ticket, Toronto-Belgrade-Titograd, for \$848.00 (including \$40 in taxes) to travel on JAT Yugoslav Airlines. When JAT's landing privileges were suspended in the spring of 1992, Mr. Jaku testified that he was stranded in Albania for eight days. He was forced to make alternate travel arrangements, purchasing a one-way ticket from Swiss Air to return home that cost him \$1380.00 U.S.

Mr. Jaku thus claimed \$1725.00 (Canadian) from the Fund to compensate him for the cost of his alternate travel arrangements with Swiss Air. The Board of Trustees, in a letter dated February 5, 1993, compensated Mr. Jaku the amount of \$404.00 only, being half the value of his round-trip ticket from JAT.

Mr. Jaku thus appeals the Board's decision to deny him the balance of his claim, being \$1321.00. He argues that he, like Mrs. Ahmad, had no choice but to purchase the alternate travel services. He notes that he makes no claim for the additional costs incurred because of the failure of JAT to provide his flight home.

Both Mr. Jaku and Mrs. Ahmad's representative assert that their claims are fair and reasonable under the circumstances and should be compensated under the Travel Industry Act, which is designed to protect the consumer.

Counsel for the Board argued that section 15(1) of the Schedule to Regulation 1085 under the Act does not permit compensation to be paid under these circumstances. For ease of reference, the relevant portion is set out below:

A client who has made payment for travel services to ... a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of money so paid to the extent only that such services are not so provided....

Counsel asked what did the Applicants pay for and what did they receive? Each of the Applicants paid registered Ontario travel agents for round-trip flights on JAT and each reached their destination. What they paid for and did not receive from JAT were

their flights home. Counsel acknowledged that both Applicants then found themselves in difficult circumstances; it is not disputed that the Applicants made reasonable travel arrangements under these circumstances.

Nevertheless, according to counsel, the Board properly compensated the Applicants, who received only half of the value of the original travel services contracted for, by paying the Applicants half of what they "so paid" originally.

This Tribunal found the claims of both Applicants to be fairly presented and credible. However, despite substantial sympathy for these Applicants, this Tribunal agrees with the arguments by counsel for the Board of Trustees.

This Tribunal is bound to apply the law as set out in section 15(1) of the Schedule to Regulation 1085 to the Travel Industry Act. This law governs and defines the circumstances under which the Fund can compensate members of the travelling public.

Circumstances substantially similar to the Applicants were present in the case of Fereydoon Mojaded-Shahrooz, decided by this Tribunal on September 21, 1993. In that case, the Tribunal upheld the Board's decision to deny the applicant compensation to cover the cost of his alternate travel arrangements, also necessitated by JAT's suspension of operations. The applicant was however entitled to be compensated for half of the value of his original return ticket.

In the view of this Tribunal, what Mrs. Ahmad is entitled to claim is half of what she "so paid" for her original round-trip tickets on JAT because she received only half their value. Thus, the amount of \$1330.00 is properly compensable.

Similarly, Mr. Jaku is entitled to claim half of what he "so paid" for his original round-trip ticket on JAT because he received only half its value. Thus, the Board properly compensated Mr. Jaku in the amount of \$404.00.

Neither Applicant is entitled to claim a refund of monies paid to other parties, namely Lufthansa and Swiss Air, for the flights home that were provided by these airlines to the Applicants.

Therefore, by virtue of the authority vested in it under section 17 of the Schedule to Regulation 1085 under the Travel Industry Act, this Tribunal upholds the decision of the Board of Trustees of the Fund to disallow the claims of the two Applicants.

HAMID AZARBANI

APPEAL FROM A DECISION OF THE
BOARD OF TRUSTEES OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding

APPEARANCES:

SUSAN CAMPBELL, representing the Board of Trustees
of the Ontario Travel Industry Compensation Fund

No one appearing for the Applicant

DATE OF

HEARING: 13 September 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund. This decision was set out in a letter to the Applicant dated May 28, 1993. This date was fixed for a hearing to commence at 9:30 a.m. and, as appears from Exhibit 5, a copy of the Notice of this hearing was delivered by Purolator Courier to the Applicant at his address on March 23, 1994.

The Tribunal concurs that the issue in this case is the same as the issue in the four decisions of the Commercial Registration Appeal Tribunal reviewed by counsel representing the Board of Trustees of the Ontario Travel Industry Compensation Fund. The four decisions reviewed are: Fereydoon Mojaded-Shahrooz released September 23, 1993, Vasilios Gadoutsis released May 13, 1994, Peter Tilkov released August 12, 1994 and Ahlam Aboud Ahmad joined with Tonin Jaku released August 12, 1994. In these circumstances, the Tribunal is bound to apply section 15(1) of the Schedule to Regulation 1085 of the Travel Industry Act which defines and governs the circumstances under which the Fund can compensate members of the public. For that reason, by virtue of the authority vested in the Tribunal by section 17 of the Schedule to Regulation 1085 under the Travel Industry Act, the Tribunal upholds the decision of the Fund and directs the Board of Trustees of the Ontario Travel Industry Compensation Fund to disallow the claim.

HELEN BALL ET AL.,
joined with
A. BOUNDRIS ET AL.,

APPEAL FROM A DECISION
BY THE BOARD OF TRUSTEES
UNDER THE TRAVEL INDUSTRY ACT

TO DISALLOW THE CLAIMS

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES:

PIERRE MARCHILDON, counsel representing the
Applicants, HELEN BALL ET AL.

GLYN WIDE, representing the Applicants,
A. BOUNDRIS ET AL.

SUSAN CAMPBELL, counsel representing the
Board of Trustees under the Travel Industry Act

DATE OF

HEARING: 20 September 1994

Toronto

REASONS FOR DECISION AND ORDER

Helen Ball, together with Mr. & Mrs. V. Bubrin, Kathleen Callanan, Joseph Caputo, Barbara Chiu, Barbara Colouhoun, John Denton, Ingeborg Dowrick, Catherine Grummett, Elizabeth Kirby, Ellen Marchildon, Adelaide Marie, Nick Minichillo, Marie Piscitelli, Helen Pocarovsky, David Ponziani, Betty Ratcliffe, Jong Soon Rim, Kathy & Ed Voltan, Ernestine Walters, Dr. M.J. Wiley, John Wolowiec, Johanna Zbogar, who are parents/guardians of students from Our Lady of Sorrows School of Toronto, Ontario ("O.L.S.S. Applicants") appeal a decision by the Board of Trustees of the Compensation Fund under the Travel Industry Act (the "Act") to deny them compensation in the amount of \$100 per Applicant.

As a preliminary matter, upon the submissions of counsel for the Board and with the consent of counsel representing the O.L.S.S. Applicants, this Tribunal ruled that it had no jurisdiction to hear the appeals of the following persons named in the Notice of Hearing: Yvonne Buerliowski, Gloria Durkacz, Patricia Edwards, Stan Haliniak, Maria Kuczkowski, Douglas Owens, Rosalba Velastegui. Mr. Douglas Owens had withdrawn his appeal; the remaining individuals, it was agreed, had failed to comply with the procedural requirements of properly filing a claim before this Tribunal.

Due to the similarity of fact and legal issues shared between this matter and the appeal of A. Boundris et al., all parties agreed that these two matters should be heard together.

Thus, joined with the hearing of this matter was the appeal of A. Boundris, Betty Chou, Erline Devins, Joanne Eagles, Kathy Greenaway, Donna Maiuk, Judy Pattison, Anna Pivonka, John Underwood and Margaret Wide, who are parents/guardians of students of Cardinal Heights Middle School in Hamilton, Ontario ("C.H.M.S. Applicants").

Again as a preliminary matter, upon the submissions of counsel for the Board and with the consent of the representative of the C.H.M.S. Applicants, this Tribunal ruled that it had no jurisdiction to hear the appeals of the following persons named in the Notice of Hearing: Douglas Gray and L. Lebeau. It was agreed that both individuals had failed to make a timely appeal to this Tribunal.

The C.H.M.S. Applicants also appeal a decision by the Board of Trustees to deny them compensation in the amount of \$100 per Applicant.

The Board refused all the Applicants' claims upon the same ground. Referring, for example, to the Board's decision letter, dated August 13, 1993, denying the claim of Judy Pattison, a C.H.M.S. Applicant, the Board stated that the Course Enrollment Fee of \$100 paid by each Applicant to Interface: A Meeting of Cultures Ltd. ("Interface") was not a "travel service" within the meaning of the Act and thus was not compensable.

For ease of reference, the definition is set out below:

"travel service" means transportation, sleeping accommodation or other service for the use of a traveller, tourist or sightseer.

It is not disputed that Interface closed its doors in May 1993, leaving certain O.L.S.S. students and C.H.M.S. students without their school trips, for which their parents/guardians had paid. Claims were filed with the Board resulting in compensation being paid, minus the \$100 Course Enrollment Fee and GST.

Michael Melady, the Principal for Our Lady of Sorrows School testified that the grade 8 students had planned to travel to Quebec City in mid June 1993, through a trip provided by Interface. Mr. Melady agreed that this school trip was "educational".

Entered into evidence was brochure material produced by Interface, describing the Quebec trip as "A Unique Bicultural Learning Experience". Interface describes itself as presenting since 1976, "educational travel programmes... of the highest calibre combining academic instruction, physical activity and bicultural experiences." Mr. Melady agreed that those activities, according to the brochure material, included the following: on Day 2, "classroom instruction [beginning] with an introduction to the history of Quebec City...[followed by a tour] with our highly qualified instructors". The students were also to participate in a "costume workshop with emphasis on the life of the people of Nouvelle France"; on Day 3, the students were to have a "full day of direct contact with Francophone students [during which] various communications games will allow the students to practice their language skills [promoting] fun, friendship and a greater understanding of our cultures".

Mr. Melady further agreed that he had viewed in the past a form similar to that entered into evidence that broke down the total cost of the program into two separate categories. He agreed that these categories were: firstly, a "Course Enrollment Fee" of \$100.00, which according to the form included: academic instruction, direct contact with Francophone students, communication workshops, activities program - French Canadian Games, Costume Workshop, Soiree Folklorique, presentation of Interface pins, and administration; and secondly, a "Travel and Accommodation Fee".

The total cost of the program was either \$369.00 or \$399.00 (depending when payment was made). The Program is stated to include: transportation, accommodation, breakfast, dinners, instruction as per attached curriculum, gratuities and cancellation insurance, all taxes and service charges.

The same form details the different cancellation policies that apply to each category. The Course Enrollment Fee is fully refundable for any reason up to October 1, 1992, after which a \$25.00 handling charge will be deducted from any refund, upon presentation of a medical certificate. The Travel and Accommodation Fee can be cancelled for any reason up to 45 days before departure, after which no refund will be paid without a medical certificate.

Fortunately, the students of Our Lady of Sorrows School were able to take a school trip to Quebec City in mid June 1993. Mr. Melady stated that alternate travel arrangements were made with Young Explorers: Customized Educational Tours for a 5-day trip at a total cost per student of \$409.00. Mr. Melady testified that he viewed this alternate school trip as very similar to the trip that Interface was to provide. He identified the trip schedule by Young Explorers, which was entered into evidence, that describes some of

the trip activities as: "walking tour of Old Quebec, tour of the Beupre Coast, Louis Jolliet Student Dance Cruise, uncovering a mystery in Place Royale and Museum of Civilization Game.

On behalf of the students at Cardinal Heights Middle School, Ms. Judy Pattison testified that they were to be provided a school trip to Ottawa through Interface. She stated that she recalled viewing a brochure produced by Interface describing the Ottawa trip as "A Study of Our Capital Region". Similarly, this brochure breaks down the total cost of the program into two separate categories: a Course Enrollment Fee of \$100.00, which includes academic instruction, educational performances and administration; and a Travel and Accommodation Fee. Different cancellation policies apply to the different Fees, as stated above in the Quebec trip brochure.

The total cost of the program was either \$239.00 or \$269.00 (depending when payment is made) and includes: transportation, accommodation, breakfast, dinners, instruction as per attached curriculum, gratuities and cancellation insurance, all taxes and service charges.

Ms. Pattison testified that she did not recall viewing another Interface brochure, which she said she obtained from her daughter who was scheduled to take the school trip. This Ottawa brochure uses language similar to that contained in the Quebec City brochure. The scheduled activities in Ottawa include "classroom introduction to the Capital", which will provide "insight into the history of Ottawa, as well as its present role in our lives, through presentations, guided tours and daily contact with our bilingual staff".

Fortunately for the students of Cardinal Heights Middle School, alternate travel arrangements to Ottawa were made through Educational Travel Services, for a total cost of \$236.47.

Ms. Pattison, as well as Betty Chou, another C.H.M.S. Applicant, testified that each regarded the \$100.00 Course Enrollment fee as simply a deposit for the trip package.

Ms. Nanci Rossi, Claims Manager for the Fund, testified that records of payments made by both Our Lady of Sorrows School and Cardinal Heights Middle School, were obtained from Interface upon its closing. These records, entered into evidence, show that the "Course Enrollment Fee" is segregated from the "Travel Services" Fee.

Under cross-examination, she stated that she was unable to characterize Interface's practice of segregating these costs as "normal" because each tour operator will individually cost and

market its product, in the very competitive industry of educational tours. She testified that she investigates for consumer payment for travel services, on the basis of documentation provided by the travel agent, because that is what is compensable under the Act.

Mr. Marchildon, counsel for the O.L.S.S. Applicants, argued that such documentation cannot be taken at face value because the Course Enrollment Fee is a disguised travel service fee. He contended that the Interface trips could not have been provided for less than their total cost. As evidence, he pointed out the similarity in cost between the alternate trips taken by the students and the total cost of the Interface trips, which included an additional \$100.00 Course Enrollment Fee. There was additionally some hearsay evidence presented on behalf of the Applicants respecting the market cost of similar trips to Quebec City or Ottawa, but little weight can be given to this evidence.

He further argued that all school trips are basically educational but predominantly fun. Thus Interface, he argued, was engaging in a deceptive practice to characterize the \$100.00 deposit for travel services as an educational component. Interface, through this practice, arbitrarily excluded a portion of the travel service fees from being compensable under the Act, which, counsel pointed out, is remedial legislation designed to protect consumers.

Counsel compared the Course Enrollment Fee to "key money", now a prohibited payment under landlord/tenant legislation, which is also remedial. He speculated that Interface may have benefitted economically in characterizing part of its travel services as Course Enrollment Fees, in an effort to reduce payments to the Fund. Towards this, he pointed out that the Course Enrollment Fees are to be handled differently than the Travel and Accommodation Fees, according to a document entered into evidence titled Interface's "Policy and Procedures for 1993 Programmes". In this document, Interface stated that "under the regulations of the Ontario Travel Industry Act, the cheque for the Course Enrolment Fee (deposit) must be issued by the individual parent or guardian to Interface, and the cheques for the Travel and Accommodation Fee must be issued by the parent or guardian to Interface Tours, to ensure coverage under the compensation fund".

Mr. Wide on behalf of the C.H.M.S. Applicants argued that the definition of "travel service" under this remedial legislation deserves latitude in its interpretation.

He agreed with Mr. Marchildon that his clients would be satisfied if about \$75.00 of the Course Enrollment Fee was regarded as a disguised travel service and was therefore compensable. The balance of \$25.00 could be treated as an administration fee, or fee for miscellany such as an Interface pin.

Counsel for the Board argued that in light of all the evidence it was reasonable to regard the Interface trips as having an educational component that was reflected in the Course Enrollment Fee.

This Tribunal agrees. The brochure material, made available for the most part to the parent/guardian, makes clear that the Interface trips were marketed as strongly educational. This interpretation is supported by comparing the scheduled activities of the Interface Quebec trip, which appear more oriented towards the educational, with those provided on the alternate trip.

Furthermore, in the absence of any evidence, this Tribunal refuses to speculate upon the business practices of Interface.

However, having found that the \$100.00 Course Enrollment Fee is properly characterized as payment for an educational component, what is the result? Is such a Fee properly excluded under the definition of "travel service" and therefore non-compensable?

Counsel for the Board referred the Tribunal to caselaw dealing with the interpretation of "travel service" under the Act. In the case of John P. Battista et al., (1981) 10 CRAT 156, the Tribunal was of the opinion that "other service must be interpreted as a direct element of travel and not an indirect element". The Tribunal thus concluded that taxes, insurance, "expenses incurred which are not in lieu of travel services contracted for, e.g. separate limousine costs", and interest on monies paid for travel services were not "travel services".

In the Dorothy Armstrong et al. (1982) 11 CRAT 212, the Tribunal excluded taxes, charges for a bag, pin, wallet, cancellation insurance and visa fees from the definition of "travel services". The Tribunal stated:

The Tribunal is of the opinion that 'travel service' includes 'escort costs' and the term is not restricted by the ejusdem generis rule to matters akin to transportation and sleeping accommodation. A service for the use of a '...tourist or sightseer' can be quite unrelated to the two specifics.

Counsel for the O.L.S.S. Applicants sought to distinguish the Leue case, (1984) 13 CRAT 305, arguing that the \$100.00 Course Enrollment Fee was not comparable to the \$25.00 "registration

(tuition) fee in respect of direct educational aspect of a trip which are related to a vocation, professions, etc.", which that Tribunal excluded as a travel service.

Presenting a nearly identical fact situation to this appeal was the case of S. Sittambalam, a decision of the Tribunal released December 6, 1993. In that case, the Tribunal, upon reviewing the above caselaw, concluded that the \$100 Course Enrollment Fee paid to Interface was not a payment for a "travel service" under the Act. The Tribunal posed certain questions "which might have thrown some different light upon the matter". These questions were not answered by the Applicants here who have the onus of establishing their claims.

Beginning with the definition of "travel service" under the Act, the phrase "other service for the use of a traveller..." is capable of broad interpretation, that is, any service of any use to a traveller, for example, complimentary coffee. However, the Tribunal in the past has chosen to limit that definition by requiring that the service be directly related to travel. Towards this, this Tribunal notes that the word "direct" is critical in the interpretation found in both the case of Battista, (travel service includes a "direct element") and in the case of Leue, (travel service excludes a "direct educational aspect").

The word "direct" in the Shorter Oxford English Dictionary is defined as, among other things, "uninterrupted, without intervening agency, immediate, not collateral".

In line with this, counsel for the Board argued that the direct elements of travel services are clearly transportation, accommodation, meals and the like. However, she argued that the educational component was indirect or not integral to the Interface trips. She stated that these school trips could have taken place without this educational component, as evident in the position taken by the Applicants that this was a fun school trip and not one that was viewed as predominantly educational.

Given this analysis and the strong support in the caselaw, this Tribunal is of the view that the Board of Trustees had a reasonable basis for concluding that the \$100 Course Enrollment Fee is not compensable under the Act. Upon review of all the evidence, this Tribunal regards the Course Enrollment Fee to be directly related to, or reflective of, the strong educational component of the Interface trips, which was an indirect element of the travel services to be provided.

Therefore by virtue of the authority vested in under the Travel Industry Act, the Tribunal upholds the decision of the Board of Trustees to deny the claims for compensation of the Applicants.

GINETTE BENAY ET AL.,
 joined with
 MARYANN CHIPMAN ET AL.,

APPEAL FROM A DECISION
 BY THE BOARD OF TRUSTEES
 UNDER THE TRAVEL INDUSTRY ACT

TO DISALLOW THE CLAIMS

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES:

SUSAN CAMPBELL, counsel representing the
 Board of Trustees under the Travel Industry Act

NO ONE APPEARING FOR THE APPLICANTS

DATE OF

HEARING: 21 September 1994

Toronto

REASONS FOR DECISION AND ORDER

This matter has come before the Commercial Registration Appeal Tribunal on the 21st day of September 1994 with Ms. Susan Campbell representing the Board of Trustees of the Compensation Fund under the Travel Industry Act and with no one appearing for the Applicants.

The Applicants from Gordon A. Brown School, to be represented by Joan Greenlaw, and named on the Notice of Hearing, are as follows: Frances Bolotovskiy, Debbie Castle, Maryann Chipman, Cita Defreitas, Paula Farsalas, Joan Greenlaw, Debbie Ko, Mary Mannion, Susan Mohammed and Mary Zigomanis.

Given the submissions of counsel for the Board of Trustees, and in the absence of the Applicants and their representative Joan Greenlaw, this Tribunal finds that it has no jurisdiction to hear the appeals of Frances Bolotovskiy and Debbie Castle because no claims have been filed. With respect to Gita Defreitas, Paula Farsalas, Debbie Ko, Susan Mohammed and Mary Zigomanis, counsel has submitted that no appeals have been filed and, therefore, this Tribunal finds it has no jurisdiction to hear those appeals.

Therefore, the Applicants with claims originating out of Gordon A. Brown School are Maryann Chipman, Joan Greenlaw and Mary Mannion. I am satisfied through the Exhibits filed, particularly the Notice of Hearing, that the Applicants so named have been

properly served and have failed to show either personally or through counsel by 10:00 o'clock a.m.

The Applicants named on the Notice of Hearing, who are presenting claims from Frederick Campbell School, to be represented by Terri Straight; are as follows: Ginette Benay, Jocelyn Dubois, Harry Gauthier, Darlene Green, John Hunt, Goretti Lafond, Marcel Langlois, Claire Ouellette, Terri Straight, L. Toussaint-Langlois and Ralph Wright. Counsel for the Board of Trustees has submitted that L. Toussaint-Langlois has filed no claim before the Board of Trustees; therefore this Tribunal is of the opinion that it has no jurisdiction to hear the appeal of L. Toussaint-Langlois.

I am satisfied again through the Exhibits filed, particularly the Notice of Hearing, that all of the named Applicants have been properly served and have failed to show either personally or through counsel by 10 o'clock a.m.

For the record, I note that each Notice of Hearing makes it clear that both hearings are scheduled for 9:30 a.m. on Wednesday, September 21st, 1994, and that this Tribunal has the jurisdiction to proceed in the absence of the Applicants and they are not entitled to any further notice in these proceedings.

Therefore by virtue of the authority vested in it under the Statutory Powers Procedure Act and the Travel Industry Act, the Tribunal upholds the decision of the Board of Trustees to deny the claims for compensation of these Applicants.

CAA TRAVEL (NIAGARA) INC.

APPEAL FROM A DECISION OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding

APPEARANCES:

SOREN HARRISON, agent for the Applicant

SUSAN CAMPBELL, representing the Board of Trustees
of the Ontario Travel Industry Compensation Fund

DATE OF

HEARING: 5 July 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from decisions of the Board of Trustees of the Ontario Travel Industry Compensation Fund upon four separate claims made upon it by the Applicant. The claims were denied in four separate letters sent to the Applicant, all dated January 27, 1994.

The Applicant is a registered travel agent in Ontario and a participant in the Compensation Fund. Its difficulties, with which we are concerned here, arose out of dealings with a registered travel wholesaler, Suntrek Vacation Holidays of Hamilton. This company encountered financial difficulties in the fall of 1992 and the last airflights which it booked were on or about January 6, 1993. At the beginning of March 1993, Suntrek notified the Ministry of Consumer and Commercial Relations of its problems and immediately representatives of both the Ministry and of the Fund attended at its premises. As a result, the company executed a formal termination of its registration on March 5, 1993.

As aforementioned, we are dealing here with claims involving four separate sets of clients or customers of the Applicant and, while the issue in each case is the same, the proper provisions of the Travel Industry Act and regulations made thereunder must be applied to four different fact situations. The first point which should be addressed is whether the Tribunal should deal with these claims pursuant to the provisions of a new set of regulations made under the Travel Industry Act which came into force on December 9, 1993 as provided in section 72 of the same or pursuant to the previous set of regulations in force up to that time.

It was the submission of counsel for the Respondent that the new regulations apply. The Applicant also had to take this position because the sole issue in each of these claims is whether the claim was made upon the fund within the time limited by the regulations. Under the earlier regulations, no appeal lay to this Tribunal from a decision of the Board of Trustees that a claim was not made on time and so, if the Tribunal has jurisdiction to hear the appeals, it must be because the claims were made pursuant to the new regulations.

Section 53 of the new regulations provides:

A customer or a registrant shall make a claim in writing to the Board of Trustees within six months after the event that gave rise to the claim.

In each of the four cases, the Applicant will fail if it is determined that the previous regulations apply as then it has no right of appeal and, if it is determined the new regulations apply, it can succeed only if it brings its claims within the provisions of section 53 aforementioned. It is conceded by the Respondent that, otherwise, the Applicant's claims herein are in order and should succeed.

The first claim concerns customers John and Elizabeth Couillard. These customers paid the Applicant \$484.00 and it booked through Suntimek a return flight from Hamilton to St. Petersburg, Florida to leave on January 21, 1993 and return on January 28. The Applicant paid the account to Suntimek for the booking and the money was lost in the failure of Suntimek. The Applicant then refunded the \$484.00 to Mr. Couillard on March 31, 1993 (see document 1 of Exhibits 5 and 6). In its letter denying this claim found at document 3 of Exhibit 5, the Board of Trustees says that the event which gave rise to the claim was that of Suntimek's surrender of its registration on March 5, 1993. The claim was received on October 18, 1993, more than six months thereafter. Since it is a necessary element in support of such a claim by a travel agent that it has lost money, it could be argued that this was not the case until it had paid the refund to Mr. Couillard. But this was on March 31, 1993, still more than six months prior to October 18.

A review of the same exercise with regard to the other three claims leads to the same result. All of these were filed on October 18, 1993 as well and if the March 5, 1993 date is the correct date as stated by the Respondent in its decision letters, one need look no further at this. But if one goes on in each of these cases and explores all other possible dates which could be found to be the date of the event that gave rise to the claim, in

all three of these cases every such date is more than six month's prior to October 18.

Accordingly, the Applicant cannot succeed with any of these claims. If the Board of Trustees and this Tribunal must deal with them pursuant to the provisions of Regulation 1085 of R.R.O. 1990 and Ontario Regulation 695/91, in force up to December 9, 1993, the Tribunal has no jurisdiction to hear this appeal or to disturb the decision of the Board of Trustees. If the Tribunal must deal with them pursuant to the provisions of the new regulations which came into force on December 9, 1993, it must follow the provisions of section 53 thereof and find that the claims were not made on time.

Therefore, pursuant to the authority vested in it by the Travel Industry Act and the regulations made thereunder, the Tribunal directs the Board of Trustees of the Ontario Travel Industry Compensation Fund to disallow these claims.

JENNIFER CLAY

APPEAL FROM A DECISION OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
SELWYN CHARLES, Member

APPEARANCES:

JENNIFER CLAY, appearing on her own behalf

SUSAN CAMPBELL, representing the
Travel Industry Compensation Fund

DATE OF

HEARING: 8 March 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund set out in a letter to the Applicant dated August 13, 1993. The relevant facts are not in dispute. The Applicant, a resident of Vancouver, saw an advertisement in the "Globe and Mail" placed by an Ontario travel agent, Travel Deals Inc. for Club Med vacations in various places at discounted prices and booked such a vacation through that agent for a vacation in the Turks and Caicos Islands. The discount was to be on the "land only" portion of the trip, namely the stay in the Islands and this was apparently the reason that the price of the total vacation was divided into three parts - the air flight from Vancouver to Toronto and return, the flight from Toronto to Turks and Caicos Islands and return, and the stay on the Islands. The discount was to be 10% of the cost of the stay on the Islands or \$232.00 and was to come to the Applicant by way of a rebate credited to the credit card with which she paid for the trip and this credit was to be put through on the date of her return.

She paid for the trip as aforementioned and received her tickets on April 13, 1993. The trip was to begin on April 18. On April 16, she received a telephone call from someone at Travel Deals Inc. who told her that the company was going out of business and closing its doors. She asked the person about her rebate and was told she would have to deal with that upon her return as

this was the time when it would become payable. Her trip proceeded as planned until she came to return from Turks and Caicos to Toronto when she was "bumped off" the aircraft at the airport. She understood this was because it was overbooked. She was able to get the airline to bring her to Toronto the next day without any additional charge (she did have to pay an extra day's rate at an hotel), but the delay caused her to miss the return flight booked to Vancouver and she had to pay \$182.00 extra to fly there a day later.

When she got back, she attempted to contact Travel Deals Inc. to get her rebate, but was unable to locate anyone who had anything to do with that company. She then contacted the Travel Compensation Fund and made the claim for the \$232.00. She advised the office of the Fund of other items of loss incurred by her, but she did not include anything except the \$232.00 in her Proof of Claim and, therefore, this is the only item at issue in this appeal.

In its letter denying the claim, the Ontario Travel Industry Compensation Fund stated:

The Board has determined that the eligibility requirements as outlined in Section 15 of the Schedule to Regulation 1085 enacted under the Travel Industry Act have not been met. This Section provides that a claim is not eligible for reimbursement when travel services have been provided and the claim is based on the cost, value or quality of same.

Travel services which you purchased were provided by Travel Deals prior to its closure and your claim is based on the collection of a goodwill gesture promised by Travel Deals in the form of a rebate, on the cost of your holiday. In the past the Board of Trustees has consistently held that a goodwill gesture made by a travel company does not constitute "payment" for travel services not received and accordingly has found that no provision exists within the current legislation to find such a claim to be eligible for reimbursement from the Fund.

While the Tribunal has some sympathy for the Applicant by reason of the predicament in which she finds herself through no fault of her own, it is not able to assist her in these circumstances. She based her claim upon the provisions of Section 13(1) of the Act which provides:

13(1) Where any person is entitled to the repayment of any money paid for or on account of a travel service, any travel agent and any travel wholesaler who received such money or any part thereof is liable jointly and severally with any other person liable therefor, for the repayment of such money to the extent of the amount received by him, her or it.

This provision clearly gives the Applicant a good claim against Travel Deals Inc. for the \$232.00, but does not avail her against the Fund. To recover from the Fund, the Applicant must bring her claim within the provisions of Section 15(1)1. of the Schedule attached to Reg.1085 made pursuant to Act:

15(1)- The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay, provided that the claims meet the following requirements:

1. A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of money so paid to the extent only that such services are not so provided and after the client has made a demand for payment from the participant that the participant has refused without legal justification to pay or is unable to pay by reason of bankruptcy or insolvency, but a client is not entitled to claim for a refund of any money paid to a participant where the client has been provided with travel services or alternative travel services and such claim is based on the cost, value or quality of the travel services provided.

The travel services for which the Applicant contracted during her stay on Turks & Caicos Islands were in fact provided to her and she is, therefore, not a claimant who did not receive them. Without this rebate, these services cost her more than she contracted to pay, but a claim on this basis is clearly excepted by the last clause of the section.

At the conclusion of her argument to us, the Applicant complained of the fact that she did not get as much assistance from the staff at the office of the Compensation Fund as she might have expected to get. She advised them of the various amounts she had lost by reason of what had happened - the \$232.00 in issue here, the \$182.00 extra paid to get home to Vancouver from Toronto and

some other items as well. Counsel for the Board of Trustees countered this by pointing out that it was still open to her to claim the \$182.00 (saying she was not barred by the limitation because she has given notice of the loss within the time limited) and that the staff cannot and indeed must not attempt to dispose of claims made upon the Fund. This is the function of the Board. While the Tribunal appreciates that the staff is limited in what it can do in this respect, it does appear to us that the persons with whom she dealt previously in the office of the Compensation Fund could have been of a little more assistance in helping her to decide to pursue a claim for the \$182.00 where she may be entitled to proceed rather than this one for \$232.00 where she clearly had no chance to do so.

Accordingly, the Tribunal pursuant to the authority vested in it by section 17(3) of the Schedule attached to Ont. Reg. 1085 refuses to allow the claim of the Applicant.

FRANCO DORIA

APPEAL FROM A DECISION OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
SELWYN CHARLES, Member

APPEARANCES:

FRANCO DORIA, appearing on his own behalf
MARALISA GARGIULO, also representing the Applicant

SUSAN CAMPBELL, representing the
Travel Industry Compensation Fund

DATE OF

HEARING: 16 March 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from the decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund set out in a letter dated September 7, 1993 in which the Applicant's claim was denied. I should first deal with the facts.

In July of 1993, circumstances arose whereby the Applicant found it necessary for himself and his wife to travel to Lamezia, Italy on a family matter. He approached one Rosemary Cappadocia who he believed was a travel agent and who he knew was experienced in this business. In fact, Ms. Cappadocia had worked for sometime with her father Joe Garisto who had operated Joe Garisto Travel from February 1988 to March 11, 1993. Document 7 of Exhibit 5 shows that he was registered under the Act as a travel agent during this period and that his registration terminated on the latter date.

The Applicant met Ms. Cappadocia in premises on St. Clair Avenue West in Toronto which may have been the former offices of Joe Garisto Travel on July 8, 1993 and gave her \$2,160.00 in cash for the trip for which he received a receipt bearing that date from "R. Cappadocia". Upon this document, it is noted that it was received for future travel for air fares for two persons and cancellation insurance. On the same day, Ms. Cappadocia purchased a bank draft for \$2,034.02 payable to "Trendy Holidays" and forwarded the same to that company in payment for the two return air tickets from Toronto to Lamezia, Italy. On the top of the aforementioned receipt which is from a plain book of receipts (with

no name printed thereon), is printed by hand the words "Trendy Holidays". In fact, this firm was registered in Ontario under the corporate name of Trendy Holidays Inc. as a wholesaler under the Travel Industry Act from January 5 to July 21, 1993. (see document 5 of Exhibit 5). Ms. Cappadocia was never registered under the Act. (see document 6 thereof).

Initially all was well with the arrangements made. Ms. Cappadocia sent the draft to Trendy Holidays and it issued the tickets for travel to Lamezia on August 10, 1993 and return to Toronto on September 8, and Ms. Cappadocia gave them to the Applicant. However, in the interval Trendy Holidays became bankrupt, its registration was terminated on July 21 as aforementioned and the airline flight for which it had issued the tickets was cancelled, perhaps because Trendy Holidays had not paid the airline. This left the Applicant with two worthless airline tickets in his possession. He immediately took up the matter with Ms. Cappadocia who refunded to him the additional amount he had paid for the cancellation insurance. The \$2,034.02, however, could not be recovered from Trendy Holidays because it was bankrupt. The last sheet in Exhibit 6, being a computer printout from the records of Trendy Holidays shows that that company did receive the money on July 9, 1993 and had booked a flight to depart August 10, 1993 from "SUF" presumably the call letters of the destination airport in Italy. Faced with this predicament, the Applicant had to borrow \$2,360.00 to pay a second time for tickets for his wife and himself to go to Lamezia on August 13 and return on September 10, 1993.

On July 29, 1993, the Applicant filed this claim against the Compensation Fund to recover the sum of \$2,030.00. During the course of dealing with the matter, the officials acting for the Fund, including its Director Nancy Rossi who gave evidence at this hearing and its counsel who appeared here made every effort which they could to find some way to assist Mr. Doria. Ms. Campbell told the Tribunal that they had great sympathy for Mr. Doria as a result of what had happened and said that what had happened to him should not be allowed to happen to anyone in Ontario. After hearing the evidence, the Tribunal shares these views. However, to succeed here, one of two issues raised must be determined in the Applicant's favour. One of these is a question of fact and the manner in which Ms. Campbell dealt with it underscores the point that she was trying to help Mr. Doria if a proper way of doing so could be found.

This was the issue as to whether Ms. Cappadocia was at the material time working as an employee of a registered travel agent, Ital Travel. If this fact be found here, then the Applicant would succeed. The evidence which we have on the point is not the best evidence as it is almost all hearsay. The Applicant's granddaughter Maralisa Gargiulo who attended the hearing to assist

her grandfather, gave evidence as a witness and said that she had called Ms. Cappadocia on the telephone about the matter and that the latter told her that at the time she took the money and made the booking through Trendy Holidays, she did so as an employee of Ital Travel. There were two different explanations given as to why she booked directly with the wholesaler and not through Ital Travel. One was that Ital Travel was behind in payments to Trendy Holidays and would not accept new bookings until these payments were made good and the other was that there was not enough time to put it through Ital Travel and meet a deadline for the booking that was made.

On the other hand, Nancy Rossi, the Claims Manager for the Fund, gave evidence that she spoke on the telephone with Salvatore Parisi, the Manager of Ital Travel, and that he told her that Ms. Cappadocia was not employed by his firm and further that none of his employees were allowed to take money directly from clients as she did here. This last point is supported by a letter (Exhibit 7 herein), to the Compensation Fund signed by Mr. Parisi in which he states: "This is to inform you that we never gave to any of our employees the authorization to collect money personally from our clients." Ms. Campbell asked Ms. Gargiulo to find out from her grandfather where he had met Ms. Cappadocia to carry out the original transaction. His answer was that he met her in the offices on St. Clair Avenue as aforementioned. The only answer to this question which would have had a significant effect upon the outcome of the case would have been that he met her at the offices of Ital Travel and that is why we commented that Ms. Campbell was obviously trying to help the Applicant in asking this question. Such an answer would probably have been corroboration of the evidence that Ms. Cappadocia was an employee of that firm to support a finding of fact to this effect.

Without anything further, the Tribunal must first determine the question of fact upon what is not very satisfactory evidence. We have no hesitation in accepting completely the evidence given by Ms. Gargiulo and Ms. Rossi on the point as to what the other parties said to them on the telephone. Indeed, no one suggested that either of these witnesses was otherwise than completely honest and accurate in giving this evidence. The question is which of Ms. Cappadocia or Mr. Parisi told the truth in their respective telephone conversations or perhaps more accurately, should the Tribunal on the evidence which we have here made a finding of fact that Ms. Cappadocia was, at the material time, an employee of Ital Travel and acting as such when she took the money and made the booking. In answering this question, I must be mindful of the following considerations. In the first place, the onus of proving this fact always lies and is upon the Applicant. A subpoena could have been issued to Ms. Cappadocia so she could have been here to give her evidence and whatever she said

would not have been hearsay. Also in considering the motives which she and Mr. Parisi might have had respectively to mistate the facts (as one of them obviously knowingly did), it is our view that Ms. Cappadocia had a real interest in doing so and Mr. Parisi did not. If, in fact, she had been his employee and he acknowledged the fact, the Fund would have paid the claim and the downside to him would have been minimal (any depletion of the fund has some, albeit a small negative impact on all participants.) On the other hand, Ms. Cappadocia appears to be somewhat experienced in the travel business and probably knew that if she, an unregistered person booked directly with a wholesaler which was not registered as a travel agent, she may be in breach of Section 3(1) of the Act and also might be personally liable to the Applicant on some basis in a civil proceeding. Also, we have a little bit of more direct evidence from Mr. Parisi in Exhibit 7. What he says in the letter makes sense and is the policy one would expect to be followed by a responsible travel agent. Accordingly, other things being equal, if both of these persons whose statements were reported here by way of hearsay evidence had given the same evidence as witnesses at the hearing, the Tribunal would probably have preferred the evidence of Mr. Parisi. In all of these circumstances, the Tribunal cannot make a finding of fact here that Ms. Cappadocia was employed by Ital Travel at the material time and was acting in what she did as its employee or servant. Accordingly, this issue must be determined in favour of the respondent.

This brings us to the second question which must be determined - can the Applicant succeed upon the other facts as outlined above? We have already referred above to the fact that we share the feeling of sympathy for Mr. Doria and the difficulty in which he found himself through no fault of his own and have no hesitation in saying that we would resolve this appeal in his favour if there were any proper legal way of doing so. Most reluctantly we have come to the conclusion that there is not.

We must begin from the position that before this Ontario Travel Industry Compensation Fund was put in place, there was no such method of compensating anyone for a loss of this type and the only recourse a wronged customer or client had was to sue parties who might be responsible for the loss. In this case, it is clear that Trendy Holidays would be held so responsible, but it is bankrupt and the dividend on claims against the Trustee would undoubtedly be zero or close to it. We have already referred above to the potential liability of Ms. Cappadocia and will say nothing further about that here. There remained for the Applicant this attempt to recover from the Fund. But the Fund has no liability or obligation to him or persons in his position other than that imposed or established by the Statute and the Regulations made under it.

The governing provisions are found in Section 15(1) of the Schedule to Regulation 1085 made pursuant to the Act:

15(1)- The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay, provided that the claims meet the following requirements:

1. A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of money so paid to the extent only that such services are not so provided and after the client has made a demand for payment from the participant that the participant has refused without legal justification to pay or is unable to pay by reason of bankruptcy or insolvency, but a client is not entitled to claim for a refund of any money paid to a participant where the client has been provided with travel services or alternative travel services and such claim is based on the cost, value or quality of the travel services provided.

The Applicant just does not bring his claim within this definition. There is no doubt he thought he was a client for travel services and that he made the payment of the \$2,034.00 for travel services which he did not receive. The trouble is that he did not make the same to a 'participant' who was a travel agent in Ontario. A travel agent in Ontario means a travel agent as defined in this Act and who must also be a participant as defined in Section 1 to the Schedule concerning the Terms of the Compensation Fund being part of Ontario Regulation 1085:

"participant" means any travel agent or travel wholesaler who is a subscriber to the fund with the approval of the Registrar;

This means that Ms. Cappadocia, to come within this definition, would have to have been registered at the time as an agent which she was not. Trendy Holidays was a participant as a travel wholesaler and was registered as such, but this does not assist the Applicant because under the Regulation for a consumer as a claimant to qualify to recover from the Fund he must make the

payment to a travel agent who is a participant. Trendy Holidays was not a travel agent, but rather a wholesaler. There is another provision in subsection (2) of Section 15 of the Schedule whereby claims can be recovered by travel agents upon the default of travel wholesalers who are participants, but this is a wholly different matter and does not apply to the case here.

This conclusion is supported by the authority of a number of previous decisions of this Tribunal:

See Frank Hargarten case (1982) 11 CRAT 204:

The claimant Frank Hargarten booked a west coast cruise for himself and his wife through a registered travel agent (Lincoln Travel Associates) at a cost of some \$2,434.00 and paid \$609.02 as a deposit on January 19, 1981. The balance, some \$1,825.00 was paid later, on April 8, 1981.

Between these two dates, namely on March 23, 1981, the registration (under the Act) of the Travel Agent was voluntarily surrendered.

The Board of Trustees refunded the original deposit, the said \$609.02 to the claimant on the grounds it had been made during the currency of the Registrant's registration under the Act but refused to repay to the claimant the said further sum of \$1,825 on the grounds that it was a payment which had been made at a time when the Registrant was no longer registered, at a time when the fund was therefore not liable under the terms of the Statute.

.....
Accordingly, the Tribunal finds that the Trustees were lawfully entitled to disallow the second part of the claimant's claim for the refund of the sum of \$1,825 referred to.

See Onkar Travels case (1986) 15 CRAT 237 at p.238:

The claimant has argued that it acted throughout in good faith without knowledge that Skybridge Tours was not a participant. This is not disputed by counsel for the Board of Trustees. While the Tribunal sympathizes with the claimant, its hands are tied in this

matter. The Tribunal's authority extends only to claims which clearly fall within the terms of Section 15 of the Schedule. It has no authority or discretion to stretch the ambit of the coverage beyond the limits that the drafters of the Schedule clearly intended to apply.

See Rick Fisk case (1987) 16 CRAT 272 at the bottom of p.273:

The intended purpose of the Travel Industry Act was to create appropriate standards of conduct for the industry and to protect consumers against substandard conduct of those engaged in the business. Under the definition section of the Act, travel agents alone are authorized to sell travel services to the general consuming public. Travel wholesalers are defined as persons who sell travel services to other wholesalers or travel agents. However, there is nothing in the statute, even after the 1986 amendments to the Act, which specifically prohibits a travel wholesaler from selling travel services to the public. Although the registration certificate is required to be posted, there is nothing in the Act or regulations that requires the travel wholesaler to clearly inform the consumer that he is a travel wholesaler only and, therefore, may not sell travel services to the public. There is nothing in the Act that prohibits a person from holding dual registration and some persons are concurrently registered as both travel agents and travel wholesalers.

Whether the general consuming public is aware or should be aware of the distinction between a travel agent and a travel wholesaler is a moot point. In our opinion, the current situation may lead to some confusion.

Nevertheless the applicable provisions are quite clear that only persons purchasing services from travel agents are eligible to recover from the Fund. Unfortunately, Mr. Fisk is not such a person and his claim must be denied.

See Lavonne Byron case, a judgment released on January 10, 1992:

This very issue was previously considered by this Tribunal in the case of Fisk and the Board of Trustees (1987) CRAT 272. The Tribunal cannot see any basis to distinguish this situation from the Fisk case.

The Tribunal does wish to note, however, that since the Fisk decision, there have been some amendments to the Travel Industry Act. At the time of the Fisk decision, the Tribunal noted that there was nothing in the Act that prohibited a travel wholesaler from selling travel services to the public. Subsequently, the Act was amended in 1988 including Section 3(1) of the present Act which provides that "No person shall act or hold himself out as being available to act as a travel agent unless he is registered as a travel agent by the Registrar." Section 1(e) of the Act was also amended to define "travel agent" as a "person who sells, to consumers, travel services provided by another person." Of course, these amendments do not assist Ms. Byron since Kisedee chose to ignore Section 3(1) of the Act.

and finally the case of Budimir Nikolic released on January 14, 1994. Parts of this decision read:

The Applicant, who had come to Canada from Yugoslavia quite a number of years ago wished to have his parents come here for a visit in 1992. On April 2, 1992, he made an arrangement with the office of JAT - Yugoslav Airlines in Toronto whereby he paid to it the sum of \$1,730 and it issued to his parents in Yugoslavia return tickets to fly from Belgrade to Toronto and, in due course, returned to Belgrade. The tickets were provided and the two travellers came to Toronto. While they were here and before the time had arrived for their return flight, developments took place in Yugoslavia which caused the United Nations to call upon member states, including Canada, to impose certain sanctions against Yugoslavia and its successor states. The Canadian Government complied with this request and applied sanctions including a sanction

prohibiting JAT from landing in Canada.

As a result of the disruption of its business by the sanctions throughout the world and the turmoil at home, JAT ceased operations and was apparently without funds to make any reimbursements and, in any event, is not making any. The Applicant's parents had to return to Yugoslavia and the Applicant was forced to pay for a return flight on another airline. He did this by purchasing through a travel agent 747 Travel Agency two tickets on Bulgarian Airlines for \$1,240 for his parents return on July 15, 1992 from Ottawa through Sofia to their home. The Applicant claimed \$825 from the fund as being the value of the unused two return portions of the original tickets purchased from JAT.

.....

It was established by the evidence and particularly by a Director's Certificate dated November 3, 1993 that JAT Yugoslav Airlines was never registered as a travel agent or travel wholesaler under this Act.

This decision then goes on to cite a number of cases including some of those cited above and concludes:

As expressed in these cases cited, also in this case, the Tribunal has sympathy for the Applicant but cannot "stretch the ambit of the coverage beyond the limit that the drafters of the Schedule clearly intended to apply."

Accordingly, by virtue of the provisions of section 17(3) of the Schedule under the heading "Terms of Compensation Fund" attached to Ontario Regulation 1085 enacted under the Travel Industry Act, the Tribunal directs the Board of Trustees of the Travel Industry Fund to refuse this claim.

DI CIANNA, GINA

APPEAL FROM A DECISION BY
THE BOARD OF TRUSTEES UNDER
THE TRAVEL INDUSTRY ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES:

GINA DI CIANNA, on her own behalf

SUSAN CAMPBELL, counsel representing
the Board of Trustees

DATE OF

HEARING: 2 August 1994

Toronto

REASONS FOR DECISION AND ORDER

Mrs. Di Cianna appeals a decision by the Board of Trustees of the Compensation Fund under the Travel Industry Act (the "Act") denying her claim for compensation in the amount of \$1279.00.

It is undisputed that the Applicant paid this amount to Trendy Holidays in July 1993, for a return flight package, Toronto - Italy, which was not provided due to the closure of Trendy. A Director's Certificate entered into evidence indicates that Trendy Holidays Inc. was registered as a wholesaler only under the Act from January 5, 1993 until July 21, 1993, when its registration was terminated.

Mrs. Di Cianna testified that she paid \$1279 directly to Trendy, unaware that the company was not registered as a travel agent under the Act. An account receivable report from Trendy shows that the Di Cianna trip was booked directly on July 16, 1993.

In its decision letter dated January 27, 1994, the Board refused the Applicant's claim for compensation on the basis that she had paid a travel wholesaler, and not a registered travel agent, for the travel services.

The Board relied upon section 50(1)(a) of Regulation 806 which, according to Part IV, came into force on December 9, 1993. Section 50(1) and (2) are set out below for ease of reference:

50.-(1) A customer is entitled to be reimbursed for travel services paid for but not provided if,

a) the customer made payment for the travel services directly to or through a registered travel agent;

b) the customer has made a demand for payment from the registered travel agent or the appropriate registered wholesaler; and

c) the customer has not been reimbursed by,

i) the registrant because the registrant is unable to pay by reason of bankruptcy or insolvency,

ii) any other person who has received the customer's money, or

iii) any other person who may be legally obliged to reimburse or compensate the customer, including a person obliged under a contract for insurance.

2) A reimbursement under subsection (1) is limited to the amount paid by the customer to the travel agent for those travel services that were not provided.

Counsel for the Board of Trustees stated that at the time the Applicant made her claim for compensation, which was August 30, 1993, section 15(1), paragraph 1 of Regulation 1085 applied. However, counsel argued that at the time the Board made its decision, being January 27, 1994, section 50(1)(a) of the new Regulation 806 applied.

Counsel referred to previous decisions by this Tribunal, which establish that section 15(1), paragraph 1 of Regulation 1085, prohibits the payment of compensation to persons who make payments for travel services to travel wholesalers and not to registered travel agents. (See for example, Rick Fisk, (1987) 16 CRAT 272, Lavonne Byron, a judgment released on January 10, 1992, and Franco Doria, a judgment released on May 11, 1994).

Particularly relevant to the circumstances of this Applicant is a passage from the Byron case, at p.2:

Ms. Byron, at the time that she purchased her ticket, did not make an inquiry as to

whether the vendor of the travel services was a travel wholesaler or a travel agent. The Tribunal feels that she cannot in any way be blamed for not making that inquiry as it is not reasonable to expect the average consumer to know the difference, much less know that entitlement to compensation from the Compensation Fund somehow hinged upon that distinction. It is apparent to the members of the Tribunal that Ms. Byron is a victim of circumstances who, in fairness, deserves to be compensated. However, the Tribunal has no jurisdiction to award such compensation to Ms. Byron. The Regulation clearly states that compensation can only be given where the consumer purchased travel services from a participant who is a travel agent.

Mrs. Di Cianna argued similarly that having compensability hinge upon the distinction between travel wholesalers and travel agents, which may not be readily apparent to consumers, harms the very persons who are intended to benefit from this remedial legislation.

This Tribunal agrees that fairness alone would dictate that Mrs. Di Cianna be compensated.

However, despite such sympathy for the Applicant, this Tribunal has no jurisdiction, under either Regulation 1085 or the new Regulation 806, to award the Applicant compensation, where payment has been made to a travel wholesaler and not a registered travel agent. This Tribunal adopts the interpretation of the cited decisions and finds that it has no jurisdiction under Regulation 1085 to award compensation under these circumstances.

Similarly, the Applicant is not assisted under Regulation 806. Section 50(1)(a) of Regulation 806 requires that the applicant pay for travel services "directly to or through a registered travel agent" (emphasis added). Section 50(2) supports the interpretation that what is compensable is the "amount paid by the customer to the travel agent" (emphasis added). "Travel agent" continues to be defined separately under the Act from "travel wholesaler", no matter what regulatory scheme applies.

Therefore, by virtue of the authority vested in it under the Travel Industry Act, the Tribunal upholds the decision of the Board of Trustees of the Compensation Fund to disallow the Applicant's claim for compensation.

BIJAN ETEMADZADEH

APPEAL FROM A DECISION OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
SUSAN VELLA, Vice-Chair as Member

APPEARANCES:
NO ONE appearing for the Applicant

SUSAN CAMPBELL, representing the
Travel Industry Compensation Fund

DATE OF
HEARING: 16 February 1994 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the respondent to disallow, in part, a claim made upon the Fund by the Applicant. This decision was set out in a letter to the Applicant dated December 2, 1992. This date was fixed for this hearing to commence at 9:30 a.m. and, as appears from Exhibit 3, a copy of the Notice of this hearing was delivered by Purolator Courier to the Applicant at his address on December 23, 1993.

The Applicant did not attend the hearing. The Tribunal was advised by counsel for the respondent that, upon being reached by telephone this morning, the Applicant stated that he would not be attending and, in any event he had not appeared by 10:30 a.m. when the Tribunal made an order, pursuant to the authority vested in it under the Travel Industry Act and Regulations made thereunder, directing the Board of Trustees of the Ontario Travel Industry Compensation Fund to disallow this claim.

VASILIOS GADOUTSIS

APPEAL FROM A DECISION OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
SUSAN VELLA, Vice-Chair as Member

APPEARANCES:
VASILIOS GADOUTSIS, appearing on his own behalf

SUSAN CAMPBELL, representing the
Travel Industry Compensation Fund

DATE OF
HEARING: 16 February 1994 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund set out in a letter from the fund to the Applicant dated February 5, 1993. The relevant facts of the matter are not in dispute.

On March 10, 1992, the Applicant arranged through a registered Ontario travel agent, Win Travel Agency of Toronto, to obtain air travel services from Toronto to Thessaloniki, Greece and return to Toronto via Belgrade, Yugoslavia both ways. He paid to Win Travel Agency \$1,145 being \$835 for the airline tickets, \$270 for cancellation (by the Applicant) and Health Insurance and \$40 for Canadian taxes levied in connection with his outgoing flight. Win Travel booked the flight on JAT, the Yugoslav National Airline and delivered to him his tickets stamped April 10, 1992 and showing his flight from Toronto to Belgrade on May 2 and from Belgrade to Thessaloniki on May 3 and the return flight open.

Mr. Gadoutsis travelled as planned to Belgrade and Thessaloniki and remained in Greece throughout the summer. By the time he came to return, JAT Yugoslav Airlines had lost its landing privileges in Canada (and in many other countries as well because of sanctions requested by the United Nations) and appears to have been substantially, if not totally, out of business. Mr. Gadoutsis said that when he tried to contact JAT to arrange his return flight, the offices were closed and he could get no answer. He had to book a return flight through another airline KLM and he paid

\$1,080 for his ticket back to Toronto with it. He could get no refund from JAT and he made this claim upon the Ontario Travel Compensation Fund claiming the \$1,080 he had to pay.

The Board of Trustees accepted a calculation made by the Manager of the Fund that the Applicant should be paid \$417.50 rather than the \$1,080 and the Fund sent him this amount. It was calculated on the basis that he had received the benefit of all of the insurance coverage and of the Canadian tax and one-half of the benefit of the \$835 for air travel service to be provided by JAT. It was argued on behalf of the fund that it was quite generous in this respect because, if one does not use the return portion of an excursion air ticket (which this was) and applies to an airline for a refund, the airline will not refund one-half of the total price for the return portion, but rather usually only the difference between what was paid and a regular one way fare.

It was established by the evidence of its manager called as a witness on behalf of the fund that JAT Yugoslav Airlines was not a participant in the Ontario Travel Industry Compensation Fund. There was no evidence given as to whether the Applicant had attempted to get any refund of compensation from Win Travel Agency or with what result, but neither in dealing with the original claim and the awarding of the \$417.50 nor at this hearing did the Board of Trustees take the position that it was not responsible because the Applicant had not shown that the participant had refused after demand or was unable to pay. The liability of the fund is governed by the provisions of section 15(1) of the Schedule to Reg.1085 under the Travel Industry Act which states:

15.—(1) The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay, provided that the claims meet the following requirements:

1. A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of money so paid to the extent only that such services are not so provided and after the client has made a demand for payment from the participant that the participant has refused without legal justification to pay or is unable to pay by reason of bankruptcy or insolvency, but a client is not entitled to claim for a refund of any money paid to a participant where the client has been provided with travel services or alternative travel services and such claim is based on the cost, value or quality of the travel services provided.

It is clear from this provision that, to recover any money from the Compensation Fund, a claimant must first have a valid claim for the same against the participant in the Fund, in this case Win Travel Agency. But it is not necessarily every claim which the claimant may have against a participant which can be recovered from the Fund. For example, one might have a claim for

damages for breach of contract which might be calculated on a different basis, but the claim for which the Compensation Fund stands in the place and stead of the participant, is restricted to a claim for a refund (not damages) of money (or part of the money) paid by the claimant to the participant and only to the extent that the travel services for which the payment was made are not provided to the claimant. There is a further restriction in the last part of clause (1) of Section 15(1) which is not applicable in this case. The application of these words and this reasoning to the claim makes it clear that the conclusion of the Board of Trustees is correct and should not be disturbed.

The same result was reached by the Tribunal in a decision in the case of Fereydoon Majaded-Shahrooz released on September 23, 1993 and cited to us by counsel for the respondent upon facts which are similar to those herein. As in that case, the Tribunal has sympathy for Mr. Gadoutsis, but must apply the law as it stands.

He is correct when he says that he lost this money through no fault of his own. However, it should be pointed out that, without the Fund and before its days he would not have recovered the \$417.50. The Fund was established by the participants and the legislation and Regulations to ensure that persons who purchased travel services from Ontario registered travel agents and who come to have valid claims against them for refunds of money paid for travel services not received which claims the travel agents are unwilling or unable to pay are not left without any recovery of such sums.

Accordingly, by virtue of the authority vested in it in it under the Travel Industry Act and the Regulations made thereunder, the Tribunal directs the Board of Trustees of the Ontario Travel Industry Compensation Fund to disallow the claim of the Applicant.

GARDUQUE, MS. GUILLERMA

APPEAL FROM A DECISION BY THE
BOARD OF TRUSTEES UNDER THE
TRAVEL INDUSTRY ACT

TO DISALLOW A CLAIM

TRIBUNAL:

THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES:

MR. MAHESH, representing the Applicant

SUSAN CAMPBELL, counsel, representing the
Board of Trustees

DATE OF

HEARING: 5 April 1994

Toronto

REASONS FOR DECISION AND ORDER

Ms. Guillerma Garduque appeals a decision by the Board of Trustees (the "Board") of the Ontario Travel Industry Compensation Fund (the "Fund") to deny her claim for a refund of two airline tickets. The total amount in dispute is \$1540.00.

In its decision letter dated June 30, 1993, the Board determined that Ms. Garduque had failed to substantiate her claim by providing insufficient documentation. Specifically, the Board referred to the Applicant's failure to provide an invoice, receipt, proof of payment, such as a cancelled cheque, or unused tickets to support her claim.

The Board relied for its decision upon the requirements under section 15(1), subsection 1 of the Schedule to Regulation 1085 to the Travel Industry Act (the "Act"). In the Board's view, the Applicant had failed to substantiate her claim that she had paid for travel services that had not been provided to her.

The facts are disputed by the parties. This includes the method of payment for the travel services, the role of Mr. Mahesh in relation to this application for compensation, and the interpretation of the little supporting documentation provided by the Applicant.

The difficulty with the evidence began with the testimony of Mr. Mahesh, brother-in-law to the Applicant, who testified on behalf of the Applicant, as if he were the Applicant. The question arose at the hearing as to who was the Applicant.

Ms. Garduque testified very little at the hearing but did indicate that she had not signed the Consumer Claim Form, dated September 2, 1992, (the "Form"), which initiated her claim under the Fund. She is however noted as the "Claimant" on this Form. According to Ms. Garduque, her sister who resides elsewhere and who was not present at this hearing, signed the Form and Ms. Garduque signed the Release and Subrogation Form.

Accepting that Ms. Garduque is the Applicant, the bare facts are that the Garduque family in February 1991 apparently wished to provide air transportation to Ms. Garduque's two brothers, Wilfredo and Romeo, from Manila to Toronto. At that time, Ms. Garduque's mother was dying in Toronto. She later died on February 17, 1991.

Although the Claim Form shows February 14, 1991, as the date of purchase of two return airline tickets, Mr. Mahesh stated that it was February 23, 1991, when the tickets were purchased.

Ms. Garduque testified that she paid cash for the tickets. The total amount claimed on the Form as paid to Universe Travel in Downsview is \$3080.00. Mr. Mahesh testified that a \$60.00 discount was received because of the cash payment.

What occurred next, according to Mr. Mahesh, was that Romeo and Wilfredo Garduque flew to Toronto on February 27, 1991. They then applied for landed immigrant status and thus no longer required the return portion of their tickets. Mr. Mahesh stated that these tickets had an open return date to Manila for one year.

Mr. Mahesh testified that an application for a refund of the return portion of the two tickets was made to Universe Travel before the expiry date. Two Refund Notices, referred to below, which show Universe Travel as the issuing agent, are dated March 6, 1992.

According to Mr. Mahesh, Universe Travel took the original unused tickets and then informed him that it was unable to pay the refund because its bank account was frozen. There is a notation on the Claim Form that Universe Travel ceased operations on March 23, 1992. Mr. Mahesh stated that Universe Travel then advised him to apply to the Fund for compensation.

Under cross-examination, Ms. Garduque recalled meeting with Fund staff on November 17, 1992, in relation to her claim. She admitted that at the meeting she advised Fund staff that she had paid for the tickets by cheque. She also recalled stating that she would provide the Fund with this cancelled cheque, a receipt from Universe Travel, and the unused tickets.

Ms. Garduque further recalled under cross-examination that she advised Fund staff at the meeting that her brother-in-law worked for Universe Travel. However, at this hearing, she stated that she had been confused during the meeting about where her brother-in-law worked and was just guessing that it was Universe Travel.

Mr. Mahesh under cross-examination denied ever working for Universe Travel. However, he stated that he had several years experience in the travel industry. As a result, he claimed to be very knowledgeable about the meaning of the documentation supplied on behalf of the Applicant.

Returning to the issue of the method of payment, Ms. Garduque testified that she paid her portion of the ticket cost by cheque to her sister, who was not present at the hearing. Ms. Garduque concluded by stating that she was unable to find the documentation that she had promised to provide to Fund staff at the meeting in November 1992.

Ms. Dorian Werda, Administrative Co-ordinator for the Fund, testified that she had been present at the meeting. She was not cross-examined. She confirmed that she requested the specified documentation, which she never received from the Applicant. The only additional information that she received was from a male, identified as either Ms. Garduque's husband or brother-in-law, who verbally assured Fund staff that Ms. Garduque had paid for the tickets in cash.

Mr. Mahesh testified that Universe Travel did issue a receipt for cash received towards the purchase of the tickets. These tickets, according to him, were prepaid and issued by United Airlines.

However, he stated that in the emotional upheaval surrounding the death of Ms. Garduque's mother in February 1991, all supporting documentation, including the receipt from Universe Travel, was lost.

Thus, the only evidence before this Tribunal of proof of payment to Universe Travel of the amount claimed is the testimony of Mr. Mahesh and the Applicant, in the absence of an invoice, receipt or cancelled cheque.

What little documentation provided by the Applicant includes photocopies of the passenger coupons of two airline tickets issued by United Airlines. The photocopies are nearly indecipherable.

What is noteworthy is that the photocopies appear to be of tickets that are marked "non-refundable", although the word "refunded" is written across the copies. There is no indication on the photocopies that these tickets are BSP-issued.

Ms. Nancy Rossi, Claims Manager of the Fund, agreed under cross-examination that these photocopies support the conclusion that these tickets were issued by United Airlines on the basis that Universe Travel advised of prepayment. She did not agree that these photocopies constitute sufficient proof of payment because tickets are often issued on credit, in her experience.

She further testified that these tickets were not BSP-issued. Thus, in her opinion, no refund for these tickets could be obtained through the BSP system.

Despite this, the only other documentation supplied by the Applicant was a photocopy of the agent copy of two Refund Notices, which Ms. Rossi stated are used to process refunds through the BSP system. These Refund Notices are also not clearly decipherable but they are apparently dated March 6, 1992. Two amounts of \$770.00, for a total of \$1540.00, are shown. The passenger names are Romeo and Wilfredo Garduque.

According to Ms. Rossi, these Refund Notices are supplied to all BSP agents to apply for refunds of BSP-issued tickets. Ms. Rossi testified that these notices are just that; they do not constitute proof of refund.

Because these tickets could not be refunded through BSP, the Applicant would then be required to request a refund directly from the issuing agent, United Airlines. Ms. Rossi queried why the Applicant had not applied directly to United Airlines for a refund.

Ms. Rossi further testified that these tickets are made non-refundable (and marked clearly as such) in exchange for the deep discounts available through ticket consolidators.

Mr. Mahesh, on the other hand, testified that all tickets marked "non-refundable" mean simply that the airline cannot provide the refund. The holder of such a "non-refundable" ticket must apply for a refund to the travel agent because only the travel agent knows how much was actually paid by the ticket-holder.

Counsel for the Board argued correctly that section 15, subsection 1 of the Regulation, requires an applicant to substantiate payment for and non-receipt of certain travel services, in order to be eligible for compensation from the Fund.

In the view of this Tribunal, the Applicant has not discharged the onus upon her, upon a balance of probabilities, to substantiate her claim for compensation. The evidence conflicted respecting basic facts, that is, the method of payment for the travel services, the role of Mr. Mahesh in relation to this application for compensation, and the interpretation of the little supporting documentation provided by the Applicant.

The evidence presented by the Applicant and on her behalf was lacking in credibility. The testimony of the Board representatives was found to be more credible in all respects than that of the Applicant and her representative. Ms. Rossi testified that she has 25 years experience in the travel industry, including retail, wholesale and agent training in ticket sales. Mr. Mahesh, on the other hand, did not substantiate his claim to expertise in the travel industry; he furthermore argued for an interpretation that stretched the plain meaning of the little documentation provided.

In my view, under all the circumstances, the conflicts in the evidence are to be resolved in favour of the Board of Trustees.

Furthermore, the evidence presented by and on behalf of the Applicant was clearly insufficient, particularly respecting the quantum of payment. This is an essential component of a claim made under section 15, subsection 1 of the Regulation. Under this section, an applicant is only "entitled to claim for a refund of money so paid" (emphasis added).

Therefore, by virtue of the authority vested in it under section 17(3) of the Schedule to Regulation 1085 under the Travel Industry Act, this Tribunal upholds the decision of the Board of Trustees to disallow the Applicant's claim.

MIKE GVOZDEK

APPEAL FROM A DECISION OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding

APPEARANCES:

MIKE GVOZDEK, appearing on his own behalf

SUSAN CAMPBELL, representing the
Travel Industry Compensation Fund

DATE OF

HEARING: 14 June 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund set out in a letter by that body to the Applicant dated March 5, 1993. The facts are somewhat unusual.

The Applicant, who was living in Toronto, had members of his family living in Yugoslavia. In April 1992, the Applicant wished to bring his nephew Mr. Siler, who lived in Yugoslavia and perhaps in or near Belgrade, to Toronto for a visit. In order to travel, Mr. Siler needed a Yugoslav passport which he obtained and a Canadian visa which he had to get at the Canadian Embassy in Belgrade before being allowed to travel. It was the requirement of the Canadian authorities that he present to them proof that he had the means of returning to Yugoslavia from Canada at the conclusion of his visit before they would issue the visa. A common way of meeting this requirement was for persons in this position to get a return ticket in advance and show it to the Canadian officials in Belgrade. The Applicant intended to put up the money to pay for this ticket.

On or just before April 9, 1992, the Applicant attended at the offices of a travel agent in Toronto, 747 Travel Agency at 2182 Dundas St. West and made arrangements with that agency to provide his nephew with a return air ticket for this trip. It appears that the Applicant was known at this office and the agency made the arrangements and sent him a bill later. 747 Travel Agency was a participant in the Ontario Travel Industry Compensation Fund.

As a result, on April 9, 1992, JAT, Yugoslav Airlines, issued from its office in Belgrade a return ticket to Mr. Siler. This ticket was issued for a flight from Belgrade to Toronto on April 30, 1992 and for a return from Toronto to Belgrade on May 28, 1992. It was marked "Valid on JU only" and "Non refundable".

747 Travel Agency billed the Applicant \$860.00 and on April 13, 1992, the Applicant sent the agency a cheque for this amount which it deposited in its account on April 14. On April 16, the travel agency sent its cheque to Yugoslav Airlines for \$792.50, presumably the amount it had to pay to it for the ticket.

Unfortunately, for reasons we do not know and which are not relevant to issues at this hearing, Mr. Siler was not able to get his visa on time to travel on April 30 and before he got the visa, Yugoslav Airlines was prohibited from landing in Canada as a result of the sanctions requested by the United Nations and he was not able to use the ticket at all. The Tribunal was told that subsequently Mr. Siler has made his trip to Canada, travelling by some other carrier. When the difficulty first arose, the Applicant and his daughter, Tanya Spiteri, who gave evidence at this hearing, went to the travel agency about it and were told that there would be no problem. They were told that this particular problem arises from time to time with travellers from Yugoslavia and that Yugoslav Airlines would honour the ticket later as soon as Mr. Siler would have his visa. They continued to press 747 Travel Agency and were told that they should be taking the matter up with the airlines. On May 6, 1993, upon request of the Applicant, the agency wrote a letter to this Tribunal which stated:

"LINE 'VALID ON JU ONLY' 'NON-REFUNDABLE'
MEANS ONLY THAT THIS TICKET CAN'T BE
CASHED TO OBTAIN THE OTHER CARRIER TICKET.
SINCE PERSON DID NOT GET VISA, SPONSOR IS
ENTITLED FOR FULL REFUND."

(see Exhibit 6)

On May 13, 1993, Yugoslav Airlines wrote a letter "TO WHOM IT MAY CONCERN" regarding this matter in which it said, "With reference to the above claim, please be advised that note 'non refundable' indicates that the ticket cannot be refunded after the commencement of the journey."

As a result of the continuation of the sanctions, Yugoslav Airlines went out of business and eventually the Applicant could no longer make any contact with that company.

He then made a claim under the Ontario Travel Industry Compensation Fund for his \$860.00 by way of an application dated

November 16, 1992. On January 12, 1993, the Claims Co-ordinator of that Fund wrote to the Applicant a letter in which was stated:

.....
 Section 15(1) of the Schedule enacted under Regulation 938 of the Travel Industry Act states:

The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay, provided that the claims meet the following requirements:

1. A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for refund of moneys so paid to the extent only that such services are not so provided and after he has made a demand for payment from the participant that the participant has refused without legal justification to pay or is unable to pay by reason of bankruptcy or insolvency, but a client is not entitled to claim for a refund of any money paid by him to a participant where the client has been provided with travel services or alternative travel services and such claim is based on the cost, value or quality of the travel services provided.

You have stated that the passenger Mr. T. Siler was not granted a travellers Visa and Therefore could not use his ticket. As stated on the face of the JAT ticket, it is non-refundable.

Section 15(1) subsection 2 of the Schedule states that non-refundable amounts are not eligible for reimbursement from the Compensation Fund.

Notwithstanding the above, should you still wish that your claim be presented to the Board of Trustees would you please advise me to this effect in writing within 60 days or your claim shall be considered abandoned.

(see Exhibit 5)

The Applicant advised the Fund that he did wish the Board to consider his claim and he did so at its meeting on February 23, 1993. The decision was forwarded to the Applicant by the Manager, Administration and Claims of the Fund by a letter of March 5, 1993 in which she said:

The Board determined that the claim is not eligible for payment...

The Board noted that the passenger's departure date was April 30, 1992, prior to the cessation of JAT's service. Despite the fact that the ticket was not used due to the passenger's inability to obtain a visitor's visa to Canada, the Board noted that the ticket is endorsed non-refundable.

Section 15(1) subsection 2 of the Schedule to Regulation 1085 enacted under the Travel Industry Act states that non-refundable amounts are not eligible for reimbursement from the Compensation Fund.

Clause 2 of section 15(1) of the Schedule reads as follows:

2. No client shall have a claim for the refund of any money paid by the client to a participant where the client was informed prior to the making of the payment to the participant that the money paid was a non-refundable deposit or a reasonable service charged.

It was argued on behalf of the Compensation Fund that this claim came within this clause 2. The Tribunal does not find this to be the case because there is no evidence that the Applicant was "informed prior to the making of the payment to the participant that this money was paid for a non-refundable deposit." Indeed, the reverse may have been the case because the participant had been given to understand at some stage that it was the practice of Yugoslav Airlines in cases where a traveller missed such a flight by reason of not getting his visa on time, that it would permit him to travel at a later date when accommodation was available.

However, in the view of the Tribunal, this does not lead to automatic success, for the Applicant here. Such a policy on the part of the airline would not, and did not in this case, confer any right upon the traveller to which he was not entitled under the

terms of the written contract, namely the ticket. It was conceded by counsel for the Compensation Fund that had Mr. Siler been entitled to a refund, the Applicant, as the client who purchased the travel services from the participant in Ontario would have been so entitled as well. However, Mr. Siler was not entitled to a refund and therefore, this was not "a demand for a payment from the participant that the participant refused without legal justification to pay...." as required under clause 1 of the above-mentioned subsection in the Schedule.

It may be that, if the Applicant can establish in the proper forum that he was induced to enter into this contract, relying upon a representation as to the practice aforementioned, he might make a recovery but this would not be a claim within the meaning of the legislation or the Regulations.

Therefore, pursuant to the provisions of Section 17(3) of the aforementioned Schedule to Ontario Regulation 1085, the Tribunal directs the Ontario Travel Industry Compensation Fund to disallow this claim.

BASIL HERMANUS
ELENA MABARDI
SILVIA MABARDI

APPEAL FROM A DECISION
OF THE BOARD OF TRUSTEES OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding

APPEARANCES:

BASIL HERMANUS, ELENA MABARDI, SILVIA MABARDI,
appearing on their own behalf

SUSAN CAMPBELL, representing the Board of Trustees
of the Ontario Travel Industry Compensation Fund

DATE OF

HEARING: 10 November 1994

Toronto

REASONS FOR DECISION AND ORDER

Basil Hermanus, Elena Mabardi, and Silvia Mabardi (the "Applicants") appeal from decisions of the Board of Trustees of the Ontario Travel Industry Compensation Fund set out in letters to the Applicants dated June 6, 1994.

These three applications are joined for the purposes of this hearing with the consent of the parties because the Applicants' claims share similar issues of fact and law.

The Applicants testified that they were encouraged by their employer, the Wellesley Hospital, to have regular payroll deductions directed to a special travel fund which they could access for the purpose of vacation travel. The Applicants were unaware that their deductions were deposited by Accel Payroll Dynamics Inc., the company which performed payroll services for their employer, to a trust account with Central Guaranty Trust.

The travel agency in question, Accel Travel, did not have payments directed to it, except in circumstances where one of the employees booked a trip. Mr. Hermanus testified that he had taken two trips in this manner.

Silvia Mabardi testified about her unsuccessful attempts to withdraw the money from her travel fund account so that she could use it for school expenses.

Nancy Rossi, the Claims Manager of the Ontario Travel Industry Compensation Fund, testified concerning the review conducted of the Applicants' claims. A Director's Certificate dated July 20, 1994 certified that Accel Payroll Dynamics Inc. is not and has never been registered as a travel agent or a travel wholesaler under the Travel Industry Act. Another Director's Certificate dated July 20, 1994 certified that Accel Travel was initially registered as a travel agent under the Travel Industry Act as Advantage Travel on June 12, 1990. The trade name was changed to Accel Travel on July 22, 1991 until it was terminated on April 26, 1993.

A Verification Form from TD Trust Company was entered as evidence by the Fund. None of the Applicants recalled receiving this document. The form was dated June 1, 1993 and advises that TD Trust has completed its preliminary review of Accel's records in connection with the vacation travel fund. This review revealed "a significant discrepancy between the monies which ought to be in the Fund and those which remain in the Fund".

This shortfall was substantial and TD Trust proposed to send a demand letter to Accel requesting reimbursement of the shortfall. In the meantime, TD Trust requested that employees confirm the total payroll deposits indicated by the employer in the Employee Section of the Verification Form. In addition, employees were advised to enter the amount and date of all withdrawals from the Fund for the purposes of both vacations and withdrawals of cash. All forms were asked to be completed by July 15, 1993.

The Applicants find themselves in a very unfortunate situation. This is certainly a case where there is liability for the losses which they have suffered. However, it is not the Ontario Travel Industry Compensation Fund which is liable to compensate them for these losses. This is so for a number of reasons.

Section 53 of the Regulation which was proclaimed on December 9, 1993 provides:

A customer or a registrant shall make a claim in writing to the Board of Trustees within six months after the event that gave rise to the claim.

Under the prior regulation, there was no appeal allowed to this Tribunal if a claim were not filed in time. In those circumstances, the Tribunal would not have jurisdiction. Although the Tribunal has jurisdiction under the new regulation, it must find that this claim was filed out of time.

The event which gave rise to the claim may be in dispute but generally, it appears that sometime in April of 1993 the event occurred. The Board of Trustees has set the date as April 26, 1993, the date when the registration of the travel agent was terminated. Therefore, the expiration of the six month period was on October 27, 1993. Mr. Hermanus filed his claim on November 24, 1993 and Silvia and Elena Mabardi filed on November 18, 1993. The six month time period is absolute and the Tribunal has no authority to extend it, no matter the circumstances. The claims of the Applicants fail on this ground alone.

Section 50(1) of Regulation 806 provides:

A customer is entitled to be reimbursed for travel services paid for but not provided if,
(a) the customer made payment for the travel services directly to or through a registered travel agent.

The evidence is that the Applicants did not make payments directly to a registered travel agent. Their payroll deductions were deposited by Accel Payroll Dynamics Inc. to a trust account at Central Guaranty Trust, an account which was later transferred to TD Trust Company. The process appeared to be that if one of the Applicants wanted to travel, notice would be given, and only then would the funds be transferred to Accel Travel.

The evidence is also that the funds in question did not necessarily have to be used for travel services. The Applicants were informed that they could withdraw money at any time and use it for other purposes. The Tribunal heard the evidence of Silvia Mabardi who attempted to withdraw money for school expenses. Therefore, it does not appear that the Applicants are entitled to be "reimbursed for travel services paid for but not provided".

Another problem faced by the Applicants is that they supplied very sketchy records of the total amount of payroll deductions. As well, there was no evidence provided that the funds deducted were for travel services. No reliable documentation was filed to either quantify the precise amount deducted from their pay or to link those deductions with any travel services.

Although the Tribunal is very sympathetic to the plight of the Applicants, it has no authority to extend the coverage provided by the Travel Industry Act and its regulations. The drafters of this Act and the regulations set very clear requirements to be met by applicants seeking compensation from the Ontario Travel Industry Compensation Fund. These particular Applicants have not been successful in satisfying those requirements.

Accordingly, pursuant to the authority vested in it by the provisions of the Travel Industry Act and regulations made thereunder, the Tribunal directs the Board of Trustees of the Ontario Travel Industry Compensation Fund to disallow the claims of the Applicants.

DERICK HILTZ

APPEAL FROM A DECISION OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding

APPEARANCES:

DERICK HILTZ, appearing on his own behalf

SUSAN CAMPBELL, representing the
Travel Industry Compensation Fund

DATE OF

HEARING: 21 March 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund set out in a letter to the Applicant dated November 3, 1993. The facts are not in dispute.

On July 4, 1993, the Applicant attended at an office operated by Triton Airlines Inc. at the Pearson International Airport and purchased two return air tickets from that company for himself and his wife to fly from Toronto to Halifax on July 4, 1993 and return to Toronto on July 22. He paid cash and received the tickets. On July 2, the Applicant's wife received a telephone call from a woman who identified herself as a representative of Triton Airlines Inc. who advised her that the flight upon which she and her husband were booked on the 4th would not be going. When Mrs. Hiltz asked when they could get a flight, this woman said she could not guarantee anything whereupon Mrs. Hiltz asked for the money back. She was told she should send the tickets to an address in St. John's, Newfoundland which she was given and that upon receipt of the tickets, the sum of \$431.28 paid for them would be refunded. Mrs. Hiltz returned the tickets as requested, but no refund was paid by this airline.

The critical fact is that Triton Airlines Inc. was never a participant in the Ontario Travel Industry Compensation Fund. This was established by the evidence of the Director's Certificate (Document 5 of Exhibit 5) and by the evidence of Ms. Rossi, the Claim's Manager of the Fund.

Upon these facts, the Applicant cannot succeed. The governing provisions are the words of Section 15(1) of the Schedule

dealing with "Terms of the Compensation Fund" attached to Ont.Reg.1085 and which reads, in part, as follows:

15(1)- The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay, provided that the claims meet the following requirements:

1. A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of money so paid to the extent only that such services are not so provided and after the client has made a demand for payment from the participant that the participant has refused without legal justification to pay or is unable to pay by reason of bankruptcy or insolvency...

There is no doubt that the Applicant paid his money for travel services and did not get those services. Unfortunately, this money was not paid to a "participant who is a travel agent in Ontario" and no recovery can be made from the Fund. This point has been clearly established by decisions of the Tribunal in the past. This case is on all fours with the decision in the case of Budimir Nikolic released on January 14, 1994. In that case, the Applicant had purchased two return tickets for his mother and father to travel from Toronto to Belgrade, Yugoslavia on April 2, 1992 from JAT-Yugoslav Airlines which was not registered as a travel agent in Ontario and not a participant in the Fund. The travellers got to Yugoslavia from Toronto but, before the time for their return, the Canadian Government, in compliance with a request from the United Nations for sanctions against Yugoslavia as a result of a civil war which had broken out, cancelled the right of JAT to land in Canada and these travellers return flight was cancelled. The Applicants sought recovery of its costs from the Fund which denied the claim and the Tribunal upheld this decision.

In the case of Onkar Travels (1986) 15 CRAT 237, a travel agent had paid \$43,340.00 to a travel wholesaler which was not registered as such in Ontario and was not a participant in the Fund. The wholesaler failed to deliver the services, the travel agent made a claim upon the Fund which the Board of Trustees denied and the Tribunal upheld this decision saying at page 237:

While the Tribunal sympathizes with the claimant, its hands are tied in this matter. The Tribunal's authority extends only to claims which clearly fall within the terms of Section 15 of the Schedule. It has no authority or discretion to stretch the ambit of the coverage beyond the limits that the drafters of the Schedule clearly intended to apply.

Accordingly, by virtue of the provisions of section 17(3) of the Schedule under the heading "Terms of Compensation Fund" attached to Ont.Reg. 1085 enacted under the Travel Industry Act, the Tribunal directs the Board of Trustees of the Travel Industry Fund to refuse this claim.

DR. ANTON P. KACINIK

APPEAL FROM A DECISION OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
TO DISALLOW A CLAIM

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding

APPEARANCES:

DR. ANTON P. KACINIK, appearing on his own behalf

SUSAN CAMPBELL, representing the Board of Trustees
of the Ontario Travel Industry Compensation Fund

DATE OF

HEARING: 23 November 1994

Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals a decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund set out in its letter to him dated February 3, 1994. The Applicant's claim was denied under section 50(3)4 of Regulation 806 of the Travel Industry Act which reads:

A customer is not entitled to be reimbursed for the following or in the following circumstances: For a payment, including a non-refundable payment, for travel services that were available but not received if the failure to receive the travel services is due to the customer's or the traveller's action or failure to act.

An additional ground for denial of the claim was that the Adanac Tours Limited terms and conditions of sale state that Adanac "shall not be liable for any claims, losses, damages, costs, expenses ... resulting from ... weather conditions..." so that cancellation 7 days or less prior to departure results in a penalty of 100%.

The Applicant made arrangements for a ski package vacation at Mt. St. Anne, Quebec from March 14, 1993 to March 19, 1993. The Applicant paid a total of \$1239.06 as a deposit for himself and his family. He was unable to drive to the resort due to a snowstorm which resulted in the Q.P.P. closing the highway to the resort. When he telephoned the resort, he was assured that his money would be refunded by Adanac. He was then told by Adanac that the money would be credited to his visa account.

The Applicant argued that his money was not refunded solely due to the bankruptcy of Adanac. He booked through his travel agent over the telephone and the brochure outlining the terms and conditions of the contract with Adanac was never forwarded to him.

The Tribunal agrees that it is unreasonable to demand that consumers should be bound by terms and conditions found in a contract which they have never seen. In order for the Applicant to be bound by the terms and conditions of the Adanac contract, it is necessary that he receive notice of them and have an opportunity to review them.

However, it is of little significance whether Adanac promised to refund money to the Applicant. It may have had no intention of following through with its promise and even if it did, no liability attaches to the Compensation Fund as a result of such a promise. The question for the Board of Trustees and for this Tribunal is whether this claim fits within the requirements for compensation of the Travel Industry Act.

The Tribunal finds that this claim does not fit within the exclusion in section 50(3)4 of Regulation 806 even though the services were at the resort to be used. It is not reasonable to say that the Applicant's failure to receive the travel services is due to his action or failure to act. He related how he attempted to reach the resort but was prevented by a roadblock. The weather conditions which prevented his use of the travel services were beyond his control.

However, it is necessary for the Applicant's claim to fit within the entitlement section which is section 50 of Regulation 806. Section 50(1) reads:

A customer is entitled to be reimbursed for travel services paid for but not provided if, (a) the customer made payment for the travel services directly to or through a registered travel agent...

Section 50(2) reads:

A reimbursement under subsection (1) is limited to the amount paid by the customer to the travel agent for those travel services that were not provided.

In his evidence, the Applicant testified that his reservation remained booked and the resort was open with its services available when he telephoned for information from Kingston. It can not be said that the travel services in question were not provided. The definition of "provide" in The Concise Oxford Dictionary is: "make due preparation (for possible event, person's safety, entertainment etc.); make due preparation of maintenance (for person)".

If Adanac had continued to operate, neither the resort nor Adanac would have had an obligation to refund any money to the Applicant. In the circumstances of this case, the Applicant would have been the party to bear the loss. When travel services are available but the customer is not able to use them, even if through no fault of his own, the customer is not entitled to a refund unless the parties have a contract which specifies that in such an event, a refund is to be paid.

Although the circumstances in this case were unfortunate, the Tribunal has no authority to extend the coverage found in the Travel Industry Act and its regulations. The Applicant does not meet the requirements for entitlement to compensation found in section 50 of Regulation 806 of the Act.

Accordingly, pursuant to the authority vested in it by the provisions of the Travel Industry Act and regulations made thereunder, the Tribunal directs the Board of Trustees of the Ontario Travel Industry Compensation Fund to disallow the claim of the Applicant.

KING TUT TRAVEL AGENCY

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE TRAVEL INDUSTRY ACT

TO REVOKE REGISTRATION

TRIBUNAL: JUDITH A. KILLORAN, CHAIR, presiding

APPEARANCES:

AHMAD ALLOUBA, agent for the Applicant

BEV WISE, representing the Registrar under
the Travel Industry Act

DATE OF

HEARING: 12 May 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by King Tut Travel Agency, registered as a travel agent under the Travel Industry Act, from a Notice of Proposal to Revoke Registration dated August 24, 1993 and a Supplementary Notice of Proposal and Notice of Further or Other Particulars dated April 27, 1994. In the Registrar's opinion, the Registrant is not entitled to registration under Section 4 of the Act on the grounds that it is carrying on activities that are in contravention of the Act and the regulations and the past conduct of the Registrant affords reasonable grounds for belief that it will not carry on business in accordance with law and with integrity and honesty.

The Proposal alleges the following. The Registrant has failed to file its Form 1, setting out its sales volume and to make its payments to the Compensation Fund for the half-year period ending December 31, 1992. The Registrant was advised that it had failed to file its Form 1 and to make the required payment by letter dated March 9, 1993. A final request was sent to the Registrant on March 26, 1993 providing the Registrant with a deadline to submit the required filing by April 9, 1993, failing which a proposal to revoke registration would be issued. To date, the Registrant has not filed its Form 1 or made payment to the Compensation Fund for the half-year period ending December 31, 1992.

The Supplementary Notice of Proposal alleges the following. The Registrant has failed to file its Form 1 and make the required payments to the Compensation Fund for the half-year

period ending June 30, 1993. Letters requesting the filings and required payments were sent to the Registrant by the Ontario Travel Industry Compensation Fund. The Registrant did not respond to these letters. The Registrant submitted its Form 1 for December 31, 1993 on April 26, 1994. The Forms 1 for December 31, 1992 and June 30, 1993 remain outstanding. As well, The Registrant failed to file the required Forms 1 for December 31, 1990, June 30, 1991 and December 31, 1991 until April 14, 1992 after many request letters were sent.

The Registrant was asked by the Registrar to submit financial statements for the year ending December 31, 1992 by October 4, 1993. The Registrant did not do so. The Registrar was informed by the Manager of the Ontario Travel Industry Inspections Office that there have been continuing problems with obtaining financial information and the appropriate filings required under the Act from the Registrant in the past. The Registrant initially failed to respond to letters requesting financial statements for the period ending December 31, 1990 and only submitted them after a letter from the Registrar was sent. A working capital deficiency of \$28,000 was disclosed in the December 31, 1990 financial statement and as a result a letter of credit was requested.

The Registrant requested an extension for submission of a letter of credit until after the financial statement for December 31, 1991 was received by the Registrar. A financial statement for the period ending December 31, 1991 was due on March 31, 1992. It was supplied on May 25, 1992 and the working capital deficiency was assessed at \$12, 564.00. On June 4, 1992, a letter of credit or injection of capital for \$15,000 was requested by the Compensation Fund. The Registrant made a deposit on June 25, 1992 to comply with this request.

The Executive Director of the Travel Compensation Fund, the Manager of the Inspections Office, and the Registrar under the Act gave credible oral testimony and submitted documentary evidence which confirmed the allegations contained in the Proposal and Supplementary Proposal. They expressed their concerns about the Registrant's history of non-compliance and the necessity for them, in their respective roles, to protect the interests of consumers. The Tribunal was most concerned by the comments of the Registrar that in the time period since the issuance of the Proposal the Registrant had not forwarded the required documents.

Mr. Allouba, the accountant for the Registrant, did not dispute many of the allegations of non-compliance but there was one area of disagreement. Mr. Allouba claimed that he had forwarded the financial statements for the year ending December 31, 1992 on October 4, 1993 and he produced a courier slip of that date from Quasar Courier Service (Exhibit 15) addressed to Mr. Michael

Pepper, the Registrar under the Act. However, Mr. Pepper had no record of receiving the statements. There was no copy of any documents attached to the courier slip to substantiate what had been sent.

Mr. Allouba explained that the Registrant's business was seasonal and to the extent there had been any working capital deficiencies, they were not reflective of any chronic undercapitalization. He also entered submissions on this issue and figures related to the monthly bank balance of the Registrant (Exhibit 7) and when it was pointed out to him that these were simply figures typed on a piece of paper, he offered to obtain the bank statements. However, the Tribunal declined the offer as it was not necessary for the purpose of deciding this case.

Whether the Registrant had adequate bank balances or not, neither the accountant nor Mrs. Attia, one of the partners, disputed that many documents required to be filed under the Act were filed late or not at all. Providing bank statements is not equivalent to filing financial statements as bank statements do not necessarily provide the information necessary to evaluate the financial health of a travel agent. Both witnesses for the Registrant, Mr. Allouba and Mrs. Attia, testified about the serious medical problems of one of the partners in 1990-1991 at the same time as the Gulf War, both of which were factors that caused serious problems for the business. While the Tribunal may be sympathetic to these problems, this is not an adequate explanation for the Registrant's continued non-compliance with the Act.

Mr. Allouba offered to remedy all deficiencies and file the required documents as soon as possible. Despite this statement, he did not bring to the Tribunal or enter as evidence any of the required documentation. The Tribunal was convinced by the evidence that every effort had been made to encourage the Registrant to comply.

Section 15 of Regulation 1085 of the Act sets out the requirement that every travel agent shall participate in the compensation fund. This is an absolute requirement as it underpins the entire consumer protection scheme of the Act. If this requirement is not enforced, consumers are put at risk. The new regulations passed on December 9, 1993 require financial statements to be filed for the year ending December 31, 1993 and the years following. This mandatory requirement is set out in section 24(1) of Regulation 806. Earlier financial statements were required to be provided when requested by the Registrar pursuant to section 18 of Regulation 1085.

The Tribunal finds that the Registrant:

- 1) failed to comply with the requirements under the Act and the regulations by not filing Forms 1 for the periods ending December 31, 1992 and June 30, 1993;
- 2) failed to make required payments to the Ontario Travel Industry Compensation Fund;
- 3) failed to file financial statements for the period ending December 31, 1992 and December 31, 1993; and
- 4) failed to comply with repeated requests made by the Registrar under the Act and the Compensation Fund.

Therefore, the Tribunal confirms the Registrar's decision that King Tut Travel Agency is carrying on activities that are in contravention of this Act and the regulations. Sufficient evidence was not presented to support the Registrar's opinion that the past conduct of the Registrant affords reasonable grounds for belief that it will not carry on business in accordance with law and with integrity and honesty.

By virtue of the authority vested in this Tribunal under section 6(4) of the Travel Industry Act, the Tribunal directs that the Registrar under the Act revoke the registration of King Tut Travel Agency.

ASHUNI KUMAR

APPEAL FROM A DECISION OF THE
BOARD OF TRUSTEES OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding

APPEARANCES:

KATHLEEN A. HOWES, representing the Applicant

SUSAN CAMPBELL, representing the Board of Trustees
of the Travel Industry Compensation Fund

DATE OF

HEARING: 23 August 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund set out in a letter dated August 13, 1993 from the fund to the solicitors for the Applicant denying a claim for payment out of the fund.

The first and only witness for the Applicant at the hearing was the Applicant himself. He began by telling the Tribunal that at some time prior to October 1991, it was decided that eight members of his family would make a trip to India from Toronto. He said that one Jasmer Singh Layal, who owned and operated a travel agency in Toronto, called Skybird Travel Agency, was a friend of his and with whom he had done business before and that arrangements were made through this agency to book flights for these eight persons. He said that he paid initially \$2000.00 to the agency. It was his evidence at the hearing that he paid this with a cheque, but he did not produce a copy of any such cheque. When questioned about this, he said it was drawn on the same account as another cheque - of which he did present a copy.

This is an account for which he had a passbook and he does not receive a statement each month from the bank together with his cancelled cheques. When asked at the hearing why he did not get a copy of the \$2000.00 cheque, Mr. Kumar said that he asked the bank for it but they told him that, because the number of his account had been changed they could not find it for him. This explanation does not make sense. The banks are required to keep all cheques on accounts for which the account holder has a passbook

and the fact that a number is changed should not make any difference in this respect. It is a fact that banks sometimes lose these cheques, although this only happens rarely. If he had said that he had been told it had been lost or misplaced, such an explanation would have been more creditable.

It was the evidence of Dorian Werda, an administrative co-ordinator in the office of the fund that, in a telephone conversation on June 3, 1993 with Mr. Kumar, he told her the \$2000.00 was paid in cash it is also to be noted that on a Statement of the Facts set out in Tab "A" of Exhibit 7, being a brief of documents presented to the Tribunal by Counsel for the Applicant, in paragraph 2 thereof it is stated that these funds were paid in cash for which there is a fair inference that, that was what he told his solicitors at sometime.

I have referred to these details because, although the Applicants claim here does not include a claim for the return of the \$2000.00, it is a matter, of which there are several more, in which Mr. Kumar's evidence has to be questioned.

In any event, apparently before he received any tickets from Skybird, Mr. Kumar cancelled the arrangements he had made. Again, there is a discrepancy between his evidence at the hearing and what appears on the aforementioned statement of facts. At the hearing, he said he had cancelled seven of the reservations (leaving his grandmother who he said flew to India in September or October 1991). The investigator from the Fund searched the records of Skybird Travel and could find no reference whatever to any part of this transaction, the payment of \$2,000, the making of any booking or any record of any flight of anyone whom they could identify as being his grandmother. It is clear at the time he said his grandmother travelled, Skybird had received no other money from him apart from this \$2,000 which he said he paid. It was Mr. Kumar's evidence that he understood her ticket cost approximately \$800. The Tribunal was given no explanation as to what happened to the other \$1,200 or why it was not included in the calculation of what Mr. Kumar is claiming in this proceeding. Mr. Kumar did state in his evidence that "I left the \$1,200 with them because we were going later" and that was the last we heard of it.

Mr. Kumar did say that, when he cancelled the reservation he was told there would be cancellation charges. The evidence regarding these is also confusing and contradictory. The aforementioned Statement of Facts in paragraph 3 thereof states that flights for four people were cancelled. At the hearing, Mr. Kumar said he cancelled seven tickets. Ms. Werda testified that in the aforementioned telephone conversation with her, Mr. Kumar said that he was told there would be a \$100 cancellation fee on these. At the hearing, he said it was a \$50 fee and this is the amount

shown in a Statement of Defence filed on behalf of Skybird Travel Agency in a Small Claims Court action brought against it by the Applicant. See Tab B5 of Exhibit 7. This document refers to "10% cancellation charges so that it comes to \$3,474 - \$500 = \$2,974" There is no explanation as to of what the \$500 was calculated to be 10%. (Obviously \$5,000, but this figure does not appear anywhere). \$50 x 7 cancellations would be \$350.00. Finally, it was the evidence of Ms. Rossi, the Claims Manager for the Fund, that she has had a great deal of experience with cancellation fees for airline reservations and that a fee for cancellation of a reservation from Toronto to New Delhi would have to be \$200 to \$250 and not \$50.

On October 29, 1991, Mr. Kumar gave Skybird a certified cheque for \$6,932 as is found at tab B1 of Exhibit 7 and on that date made three more bookings for his father, his mother and his daughter to travel to New Delhi. He said that these were on KLM Airlines. The search made of the records of Skybird by Ms. Werda did disclose documents relating to this flight. Tab 10 of Exhibit 8 is a list of bookings for December 1991 upon which they were able to identify the last three listings as being those for Mr. Kumar's mother, father and daughter. While the names shown do not make this apparent, Ms. Rossi said that other information including addresses and telephone numbers and the other two documents being documents #11 in Exhibit 8 confirm this information. These last two are invoices for these three bookings - two at a \$1,140 for a total of \$2,280 and one for \$895. These show that these passengers travelled on Royal Jordanian Airlines and not on KLM as stated by Mr. Kumar. Also the figures shown on these documents do not correspond with the figures given by Mr. Kumar at the hearing or in calculating his claim.

When talking about the cancellation of the first reservation, Mr. Kumar told the Tribunal that he disagreed with there being any cancellation fee or charge. While he said he did not get a receipt for the \$2,000 because Mr. Layal was a friend whom he trusted at that time, by the time he paid the additional \$6,932 and made the new bookings, he had good reason to be less trustful. When asked why he had gone ahead and paid the second amount and booked again with Skybird, he said "I knew he would not give me the money back unless I booked with him." There is something strange about this answer. It indicates that, at some stage before he made the second bookings for three persons, he knew he had a real problem with Skybird. The document at tab 10 of Exhibit 8 shows these three bookings were made in December of 1991. The cheque for \$6,932 was issued on October 29, 1991. He said originally that eight bookings were made altogether and that only the grandmother travelled in the original reservation and the other seven were cancelled. If this evidence is accepted then the cancellations took place well before the larger cheque was paid.

If he had a real problem with Skybird at that time, why did he pay it another \$6,932 in October? If he made those three later bookings at the same time he paid this larger sum, the statement quoted above could only have referred to the balance of \$1,200 from the earlier payment, for which we have no records whatever and which he is not claiming in this proceeding. If he did not make the bookings until later, it is strange that he would pay this money to Skybird at a time he had a dispute with it over the previous transaction and without any invoice or ticket showing exactly what was owing for actual tickets purchased. Furthermore, on his own evidence, it was paid making up a total of \$8,632 altogether which would have covered the cost of tickets for all eight persons originally planning to travel, but paid at a time when he knew only four persons were going. This does not make sense.

We come now to Mr. Kumar's evidence of attempts to recover his overpayments. It is his evidence that he pressed Mr. Layal for a refund and on March 10, 1992, the latter gave him two cheques each for \$2,487, one dated that day and one postdated to March 27, 1992 for a total of \$4,974.00. He immediately attended at the bank on which these cheques were drawn and found the first one to be N.S.F. He went back to Mr. Layal and on March 18, 1993, the latter gave him another cheque for \$1,300 which was certified and paid. We do not know at whose instance it was certified. It is strange that Layal would give him this cheque and not get back either of the other two outstanding or make an adjustment concerning them.

On June 22, 1992, Mr. Kumar sued Skybird in a Small Claims Court for \$3,000 claiming a debt of \$3,474 (the \$4,974 above mentioned less the \$1,500 received). He pleaded the two cheques which were not paid, but he also pleaded he had purchased four tickets to India for \$4,974 which were cancelled and for which he claimed a refund. As indicated above, Mr. Kumar produced no evidence to show that \$4,974 was the cost of four tickets which were cancelled.

In a Statement of Defence filed on August 11, 1992, it is stated on behalf of Skybird that:

It is astonishing that the defendant received two claims of the same amount with the same nos. The actual claim is for amount of \$2974 and not for \$3000 viz total amount was \$4974 - \$1500 paid to the plaintiff = \$3474 - 10% cancellation charges so it comes to \$3474 - \$500 = \$2974. Due to some business problems and financial hardships, the defendant is not

in a position to pay off the entire amount in lump sum and so it would be appreciated if defendant is permitted to clear the amount of \$2974 in monthly instalments. Thanks.

Apparently next the claim was mediated by a Referee with the result that the defendant agreed to pay \$250 a month and made one such payment and then defaulted. Upon this, the plaintiff had judgment signed on December 9, 1992 for \$2,724.00 plus \$66.05 for costs and interest at 6.3% prejudgment and 7% post judgment.

Ms. Rossi told the Tribunal that the claim was denied by the Board of Trustees because the Applicant failed to produce documents or satisfactory evidence that he had paid the money he was claiming for travel services not received. She stressed the fact that he had provided no receipt portions of any tickets, no receipts or documents whatever concerning the first payment of \$2,000 and the grandmother's trip and that the one place where the Fund was able to get some documents from the travel agent's files, the figures did not bear out those given by Mr. Kumar.

Upon this evidence, counsel for the Applicant asks the Tribunal to award him \$3,122.29 being the \$2,724 aforementioned plus interest of \$398.29. She also asked about the costs in the Small Claims Court. The Tribunal does not have any jurisdiction to award in these proceedings either these costs or the interest awarded on the Small Claims Court judgment.

To recover a claim in these proceedings, the Applicant must bring it clearly within section 15(1)1. of the Schedule "Terms of Compensation Fund" in Ontario Regulation 1085 made pursuant to the Travel Industry Act.

15(1)- The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay, provided that the claims meet the following requirements:

1. A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of money so paid to the extent only that such services are not so provided and after the client has made a demand for payment from the

participant that the participant has refused without legal justification to pay or is unable to pay by reason of bankruptcy or insolvency...

The onus is upon the Applicant to prove his case. As indicated above, the evidence presented by him is quite unsatisfactory. It is far from the best evidence which should be required. Counsel for the Board of Trustees referred the Tribunal to two recent decisions which contained pronouncements relevant to these issues. See Adventure Tours case, decision issued July 20, 1994 at p.3 thereof in the second last paragraph:

What the Compensation Fund did question was, in the case of each customer, was Adventure Tours able to prove that the clients had paid the money in the first place to the agent with whom they dealt, Travel Deals. The Compensation Fund took this position for two reasons. In the first place, the onus of bringing its claims within the provisions of the section of the Regulation is always upon the claimant. It must always do this upon a balance of probabilities upon admissible evidence in order to succeed. In the second place, the Claims Manager of the Fund told the Tribunal that the extensive examination which it had made of Travel Deals' books and records and of its affairs generally had shown that Travel Deals' records were not always accurate or reliable.

And at page 5, beginning at the top:

In the third place, the only legal basis which I can see for the making of the distinction which the Compensation Fund has made here was upon the application of the best evidence rule which requires that a party, with the onus of proving something, must produce the best evidence available to do so and will fail if he tries to rely on some other evidence which is not the best evidence available.

The best evidence rule is not a binding requirement of substantive law (like the provisions of the old Statute of Frauds),

nor is it a rule upon which the party requiring the proof to be made can set arbitrary parameters. It is up to the Court or Tribunal trying a case to decide what these should be. Furthermore, the best evidence on a particular point is not what might theoretically be the best evidence but rather what, upon the facts and circumstances of a particular case, is the best evidence available and the onus upon the party with the burden of proof is to take all reasonable steps to produce such evidence. If he fails to do this, the point should probably be decided against him. However, if he does this and is unable to produce any more evidence than that which he tenders, then the trier of fact must look at all the evidence before it and determine, on a balance of probabilities, which is the more probable conclusion to be drawn on the point.

See also Joshua Silber case, decision issued August 10, 1994 at page 6:

This brings us to the question of the amount which he should recover. The onus is upon him to satisfy the Tribunal on this point. He can clearly do this with regard to the \$9,000. The evidence shows that the certified cheque in this sum endorsed by the Applicant was deposited in the dealer's bank account. However, the situation is quite different with regard to the remaining \$2,550 claimed. When asked where he got this cash, he said he withdrew it that day from his own bank account. One must wonder why, when he got a certified cheque from his friend for the \$9,000, he did not get another certified cheque on his own account for the \$2,550, not an inconsiderable amount of money to carry in cash. When asked the denominations of the bank notes in which he had the money, he was vague and really, after two or three questions, not very satisfactory in his answers. When asked why he did not get a receipt for the money, he said that he believed the Bill of Sale was a receipt. When it was

pointed out that its figures did not cover the right amount and its terms did not fit the transaction at all for that purpose (as it showed \$9,000 still as the balance due and the \$50 still to be paid on delivery), he said he had not looked at it closely enough to see this; therefore, he had not looked at it to see if it provided him with a receipt. He knew that the onus was on him to prove the point when he came here and, if he had in fact withdrawn such a sum in cash from his bank account on that date, it would have been a simple thing to have got a copy of the withdrawal slip from the bank which would have been corroboration of his evidence.

Altogether the Tribunal did not find Mr. Silber to be a convincing witness on this matter. There are too many contradictions in the evidence we have. In his whole manner of dealing with it, he was vague and far from convincing and he did not bring the best evidence in support of his story (namely, a copy of the withdrawal slip, which would have to be there if his evidence were true). While we are inclined to think that he probably paid something in cash as well as the \$9,000, we find he has not proved any specific amount which he had the onus to do and, therefore, the Tribunal cannot award him anything more than the \$9,000 here.

Mr. Kumar's evidence is just not sufficiently reliable here to meet the tests and the onus required of him. He gave three different stories as to the cancellation penalty. He originally said he paid the \$2,000 in cash and later by cheque. He produced no corroboration of either story and indeed gave an explanation as to what the bank told him about the cheque which was hard to accept. His figures were approximations and on the one point where they were tested against Skybird's documents, they did not stand up. There were too many unanswered questions and too many missing pieces. He did not meet the requirement to produce the best evidence which reasonably could have been had or the onus upon him to prove his case.

The most effective piece of evidence he did produce was the judgment in the Small Claims Court against Skybird. However, it does not put this issue *res judicata* because it is not between

the same parties. Nor does it establish by a judicial finding that the money was owing because it is a default judgement. Furthermore, there are too many peculiarities in the dealings between the Applicant and Mr. Layal for this Tribunal to draw an inference from the fact of this judgment that the sum of \$2,724 awarded then was in fact established as a sum repayable to the Applicant as a refund for the payment for travel services not received within the meaning of the Regulation quoted above.

Therefore, pursuant to the provisions of section 17(3) of the aforementioned Regulations, the Tribunal directs the Board of Trustees of the Ontario Travel Industry Compensation Fund to refuse to allow this claim.

LENNOX INDUSTRIES (CANADA) LTD.

APPEAL FROM A DECISION BY
THE BOARD OF TRUSTEES UNDER
THE TRAVEL INDUSTRY ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-chair, presiding
JACINTH HERBERT, Vice-chair sitting as member
JOHN MCGUIRE, Member

APPEARANCES: MARK A. GELOWITZ, counsel representing the
Applicant

SUSAN CAMPBELL, counsel representing the
Board of Trustees

DATE OF
HEARING: 25 April 1994 Toronto

REASONS FOR DECISION AND ORDER

Lennox Industries (Canada) Ltd. ("Lennox") appeals a decision dated October 28, 1992, by the Board of Trustees of the Compensation Fund under the Travel Industry Act, denying compensation. The amount in issue is 296,123.72, as amended by counsel for the Applicant at this hearing.

Firstly, the Board found that Lennox's claim was based on cost, value or quality of the travel services provided; thus, the claim was ineligible for compensation, under section 15(1), paragraph 1 of the Schedule under Regulation 1085 to the Act. Secondly, the Board denied the claim under section 15(1), paragraph 2 of the Schedule, upon the basis that Lennox "was informed prior to the making of the payment... that the money paid was a non-refundable deposit".

Counsel for the Applicant stated the facts were not in dispute and chose not to call any evidence.

The facts are that Lennox paid a total of \$520,878.88 to 2M Business & Incentive Travel Inc. ("2M") between November 1, 1989 and November 1, 1990, for a cruise package for employees and dealers of Lennox. After a flight to Miami, the cruise took place, beginning February 16, 1991 on board the "Sovereign of the Seas", a cruise ship owned by Royal Caribbean Cruises Ltd ("Royal").

However, on February 20, 1991, a fire broke out on the

cruise ship, when it was docked in San Juan. Filed in evidence were two affidavits of passengers who were aboard the ship during the fire. Counsel for the Board did not challenge this evidence.

Mr. James Webster stated in his affidavit that he was first informed of the fire at about midnight but was advised that passengers could safely remain in their cabins. A few hours later, passengers were advised by a second broadcast to evacuate the ship immediately. However, Mr. Webster stated that when he arrived upon the main deck with other passengers, he could see no representative of Royal requiring people to disembark. He stated that he was "very concerned about personal safety" and he remained on deck until about 4:30 a.m., when an "all-clear signal was given". The cruise continued but, as a result of the fire, Mr. Webster said that a one-day trip to St. Thomas was cancelled.

Mr. Colin Palmer advised in his affidavit of a similar experience. However, in his case, he evacuated the ship twice during the fire, upon the advice of a representative of Royal. He added in his affidavit that a large portion of the cruise vessel was cordoned off as a result of the fire. He described the fire as a "significant disruption of the cruise [he] expected to receive".

It was not disputed that Royal did refund the full cruise fare in the amount of \$415,835.39 to 2M in March 1991. In a letter dated February 20, 1991, the Chairman and CEO of Royal apologized for the "inconvenience and delay" caused by the fire. He stated further: "To demonstrate Royal Caribbean Cruise Line's regret over the fire's disruption of your cruise vacation, and the Line's appreciation for your cooperation during the incident, I am pleased to offer you a full refund of your cruise fare through your travel agent".

However, 2M refused to return the refund to Lennox, who recovered only about \$116,000.00 through settlement and garnishment, before the bankruptcy of 2M.

As a preliminary matter, this Tribunal notes that both counsel agreed that Lennox did not receive any notice prior to paying 2M for the cruise package that the following term and condition was set out in Royal's brochure:

In the event of strikes, lockouts, riots, weather conditions, or for any other reason whatsoever, Royal Caribbean may at any time and without prior notice cancel, advance or postpone or deviate from any scheduled sailing or port of call and may, but is not obliged to, substitute another vessel or port of call, and shall not be

liable for any loss whatsoever to passengers by reason of such cancellation, advancement, postponement, deviation or substitution. Royal Caribbean shall not be responsible for any failure to adhere to the arrival and departure times published in this brochure for any of its ports of call.

Counsel for the Board argued that this exclusionary clause protected Royal from any liability for failing to make the scheduled port of call at St. Thomas because of the fire. Lennox's payment for the cruise was "non-refundable" and thus, non-compensable under section 15(1), paragraph 2 of the Schedule to Regulation 1085 to the Act.

However, counsel for the Applicant argued that section 15(1), paragraph 2 did not apply in the circumstances of this case for the following reasons:

- 1) The section requires that adequate prior notice of non-refundability be given to the Applicant, which it was agreed had not been done. Furthermore, notice at the time of boarding through receipt of the brochure would not constitute adequate prior notice under the section; and
- 2) The section applies to "non-refundable deposits or service charges", which does not include the payment in full made by Lennox.

This Tribunal agrees with the arguments by counsel for the Applicant that section 15(1), paragraph 2, does not exclude the Applicant from compensation.

The key issue to be determined is whether Lennox's claim is barred under section 15(1), paragraph 1, as a claim based upon value or quality of the travel services provided. For ease of reference, the relevant portion is set out below:

A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of money so paid to the extent only that such services are not so provided and after the client has made a demand for payment from the

participant that the participant has refused without legal justification to pay or is unable to pay by reason of bankruptcy or insolvency, but a client is not entitled to claim for a refund of any money paid to a participant where the client has been provided with travel services or alternative travel services and such claim is based on the cost, value or quality of the travel services provided. (Emphasis added).

Counsel for the Applicant argued that Lennox did not receive the "travel services contracted for" because the fire substantially undermined the totality of the cruise. He asserts that Royal acknowledged this through refunding the total amount paid for the cruise to 2M, who is legally obligated to pass along this refund to Lennox.

Counsel for the Board argued that Royal's total refund could be seen as a good will gesture, made for business purposes. She stated that such a gratuitous refund, and 2M's failure to meet its legal obligation to pass it along, do not in any obligate the Fund to pay compensation for a claim based upon the value or quality of travel services provided to the Applicant. According to counsel, Lennox was provided with the travel services for which it contracted, namely, a cruise beginning on February 16, 1991, and continuing through until the early hours of February 20th, when the fire broke out, the ship was delayed for a day in San Juan and a port of call was missed; the cruise then continued for the balance of the schedule.

The legal issue for this Tribunal to determine is whether the Fund is legally obligated under the Act to compensate the Applicant. It is not to determine the legal obligation, if any, of Royal to make a full refund, and 2M's corresponding legal obligation, adjudged to have been breached, to pass along that refund to the Applicant.

This Tribunal agrees with Counsel for the Board that the Applicant was provided with the travel services contracted for and now bases its claim for compensation upon evidence that the value or quality of the travel services provided was detrimentally affected. The evidence was uncontradicted before the Tribunal that the cruise was disrupted by the fire and marred by concerns for personal safety. However, in the view of this Tribunal, such evidence goes to the value or quality of the travel services provided.

As a result, this Tribunal, being bound by section 15(1), paragraph 1 of the Schedule to Regulation 1085 under the Act, finds that the Applicant is disentitled to claim compensation based upon the value or quality of the travel services provided.

Therefore, by virtue of the authority vested in it under section 17 of the Schedule to Regulation 1085 under the Travel Industry Act, this Tribunal upholds the decision of the Board of Trustees of the Fund to deny compensation to the Applicant.

LIMNOS TRAVEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE TRAVEL INDUSTRY ACT

TO REVOKE REGISTRATION

TRIBUNAL: JUDITH A. KILLORAN, CHAIR, presiding

APPEARANCES:

SARANTIS PSARAKIS AND EFTHIMIA PSARAKIS,
representing the ApplicantBEV WISE, representing the
Registrar under the Travel Industry Act

DATE OF

HEARING: 12 January 1994

Toronto

REASONS FOR DECISION AND ORDER

Contrary to the usual practice of this Tribunal an oral decision will be rendered today. Written reasons will be issued at a later date as soon as possible.

By virtue of the authority vested in this Tribunal under section 6(4) of the Travel Industry Act, this Tribunal directs that the Registrar under the Act revoke the registration of Limnos Travel as a travel agent effective immediately.

This is an appeal by Limnos Travel, registered as a travel agent under the Act, and represented by Sarantis and Efthimia Psarakis, from a decision by the Registrar to revoke its registration.

Limnos Travel is a registered partnership established on January 17, 1989. There are three partners: Sarantis Psarakis, Efthimia Psarakis and Marija Batusic. The partnership has been registered as a travel agent since March 10, 1989.

The Registrar's decision is contained in a Proposal dated August 24, 1993 and a Supplemental Notice of Proposal and Further Particulars dated December 17, 1993.

The basis for the Registrar's decision is his opinion that Limnos Travel is carrying on activities that are in contravention of the Act and the regulations; and the past conduct of two of the partners of Limnos Travel, Sarantis and Efthimia Psarakis, provides reasonable grounds for belief that Limnos Travel will not carry on business in accordance with law and with integrity and honesty.

The Registrar alleges that Limnos Travel has failed to file its Form 1, setting out its sales volume on a half-yearly basis, and failed to make payments to the Compensation Fund based on such sales for the half-year periods ending December 31, 1992 and June 30, 1993.

Evidence was presented by the Registrar that Limnos Travel was advised that it had failed to file its Form 1 and to make the required payment to the Compensation Fund by letter dated March 9, 1993. A final request was sent on March 26, 1993 providing a deadline for filing of April 9, 1993, failing which a proposal to revoke its registration would be issued.

There was evidence presented by the Registrar, which was undisputed by the two partners representing Limnos Travel, of considerable correspondence directed to Limnos Travel which went unanswered and related to the lack of filings and the consequent non-payments to the Compensation Fund.

A faxed letter dated September 9, 1993 was sent by Richard S. Bizior, accountant for Limnos Travel, to this Tribunal. The letter offers some explanations and an apology for the lack of filings and payments. The letter also contains assurances that the Form 1 for the half year period ending December 30, 1992 together with required payment will be forwarded immediately, while the Form 1 for the half-year period ending June 30, 1993 will be delayed "a few weeks".

In his testimony, Michael Pepper, Registrar under the Act, stated that nothing was submitted by Limnos Travel after the above letter. In his view, the parties could have worked toward having the proposal withdrawn if such action had been taken. As well, Mr. Pepper testified that by letter dated August 24, 1993, which was approved by the Director, as required under section 15(1) of the Act, Limnos Travel was requested to submit financial statements for the year ending March 31, 1993, such statements to be certified by a person licensed under the Public Accountancy Act. As of the date of hearing, Limnos Travel had not complied with that request.

A letter dated January 10, 1994 was sent to this Tribunal by S.G. McLeod, a chartered accountant hired by Limnos Travel. This letter contains assurances that financial statements for the year ending March 31, 1993 and the Form 1 for the half-year period ending June 30, 1993 would be completed by January 21, 1994. However, the earlier Form 1 for the half-year period ending December 31, 1992 and the payment owed to the Compensation Fund had not been submitted.

The Supplemental Notice of Proposal and Further Particulars dated December 17, 1993 alleges that as a result of searches conducted by the Office of the Registrar, it was discovered that Sarantis Psarakis was convicted of theft under \$1,000 on October 2, 1991 in Hamilton and fined \$200. Further searches revealed that Efthimia Psarakis was found guilty of theft under \$1,000 on May 11, 1990 in Hamilton and that a conditional discharge with probation of 12 months was imposed.

The finding of guilt against Efthimia Psarakis was not disclosed on the renewal application for registration dated February 24, 1991 which was signed by Efthimia and Sarantis Psarakis. The most recent renewal application dated March 10, 1993 is signed by Sarantis Psarakis and does not disclose his conviction. In the application for registration there is a note at the top of the application which states: "the term 'Applicant' means sole proprietor, any partner of a partnership or any officer or director of a corporation."

Useful testimony was provided by the Executive Director of the Travel Compensation Fund, the Manager of the Inspections Office, and the Registrar under the Act about their respective roles and the necessity to safeguard the interests of consumers in circumstances such as this.

Mr. Psarakis did not dispute any of the evidence presented by the Registrar. He did say that it had not been his intention to avoid any of the requirements under the Act but that he had left it in the hands of his accountant. In his testimony, he revealed that he is not presently keeping proper books and records. Although he expressed great regrets, he offered no satisfactory answers about the lack of disclosure on the application; the lack of Form 1 filings and payments to the compensation fund; and the non-compliance with the requirement to file financial statements when required. Most importantly, he offered no firm commitment to remedy the situation.

In accordance with the principles set out in the Brenner decision, we cannot conclude that the Registrar is in error in finding that Limnos Travel is carrying on activities that are in contravention of this Act and the regulations; and that the past conduct of two of the partners affords reasonable grounds for belief that Limnos Travel will not carry on business in accordance with integrity and honesty.

DRAGIC MANOJLVIC

APPEAL FROM A DECISION OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding

APPEARANCES:

DRAGIC MANOJLVIC, appearing on his own behalf

SUSAN CAMPBELL, representing the
Travel Industry Compensation Fund

DATE OF

HEARING: 17 January 1994

Toronto

REASONS FOR DECISION AND ORDER

Mr. Manojlvic, I am considering this matter on several grounds - not just the lateness of your appeal. I am considering it on the basis of your appeal, the grounds for your appeal and the objections to the appeal, together with the decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund.

The Travel Industry Fund found that you did not fall with the section of the Travel Industry Act which requires that a ticket be purchased from a participating agent in Ontario. That is the first ground of their objection and you cannot object to that because the ticket was purchased in Athens from Olympia and they are not participants in the fund.

The second objection is that your ticket was substituted apparently for the travel from Belgrade to Athens. Now I grant you that that seems to be in the wrong direction, but in any event there was a substitution made and the ticket got you as far as Athens. That again is a basic objection to paying you your claim because there was a certain portion of your ticket used in the exchange for the Belgrade to Athens trip.

Those are two objections. I must without question uphold those objections. In other words, I say to you that had your appeal been heard on the merits, on the evidence before me your appeal would not have been granted in any event.

Now as far as the lateness of the appeal is concerned you were two month's late in filing your appeal. You point out that there was some confusion. Well, it appears that there may have

been. It may have been unfortunate that the documents were sent to your lawyer but in April, as Ms. Campbell points out, when you had telephoned the department, you did not mention that your lawyer was no longer involved in the matter as the result of which the decision went to him where they were instructed to send it. Up until that point all correspondence had been between your counsel and the department, and not between the department and you and it was not until after in July that correspondence was received from you in the form of the appeal.

Under the circumstances, Mr. Manojlvic, I must find that the appeal is out of time, but on the merits of the matter, the appeal would not have been granted in any event.

Therefore, by virtue of the provisions of section 17(3) of the Schedule under the heading "Terms of Compensation Fund" attached to Ontario Regulation 1085 enacted under the Travel Industry Act, the Tribunal directs the Board of Trustees of the Travel Industry Fund to refuse this claim.

MAZZONE, MR. ROCCO
joined with
ROTONDI, MRS. ROSA

APPEAL FROM A DECISION BY THE
BOARD OF TRUSTEES UNDER THE
TRAVEL INDUSTRY ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES:

MRS. MARY MAZZONE, agent for the Applicant,
Mr. Mazzone,
MR. MARINO, agent for the Applicant,
Mrs. Rotondi
MS. SUSAN CAMPBELL, counsel representing
the Board of Trustees

DATE OF

HEARING: 7 July 1994 Toronto

REASONS FOR DECISION AND ORDER

As a preliminary matter, all parties agreed that the legal issues and facts shared in the two appeals were so similar that these matters should properly be heard together.

The principal legal issue in both appeals is whether the Board of Trustees of the Fund was correct in denying the Applicants compensation for the cost of travel services they did not receive, on the basis that the Applicants allegedly made payment for these travel services to a non-participant in the Fund, who was not a registered travel agent in Ontario.

The Board relied upon section 15(1), paragraph 1 of the Schedule to Regulation 1085 to the Travel Industry Act (the "Act"), which is set out below, in part, for ease of reference:

A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of money so paid to the extent only that such services are not so provided....

Neither Applicant testified. However, it is not disputed that both Applicants paid for travel services and did not receive

them. Mr. Mazzone claimed the amount of \$1100.00 from the Fund, which was denied by the Board of Trustees in a letter dated September 7, 1993. Mrs. Rotondi claimed compensation from the Fund in the amount of \$1045.00, which the Board of Trustees denied in a letter dated August 9, 1993.

Mr. Mazzone's representative called one witness, Rosemary Cappadocia. Both Applicants, in separate transactions, had made payment directly to Mrs. Cappadocia for two return tickets issued by Trendy Holidays. Both Applicants claimed from the Fund the amounts (minus taxes) that they paid directly to Mrs. Cappadocia for the tickets with Trendy Holidays, which they were unable to use because of its closure in July 1993.

Mrs. Cappadocia testified that she was working part-time for Ital Travel in July 1993. However, she was not in Ital Travel's offices on July 13th, when both Applicants paid her directly by cheque, each desiring one return ticket, Toronto-Italy. Mrs. Cappadocia stated that she then booked these tickets directly with Trendy Holidays on the same day with her money order made payable to Trendy Holidays. She explained the direct booking on the basis that Trendy Holidays would not accept bookings from Ital Travel because of late payments.

Reference is made to a letter by Mrs. Cappadocia, dated August 12, 1993, addressed to Ms. Nancy Rossi, Manager - Administration and Claims for the Ontario Travel Industry Compensation Fund, which was entered into evidence. In this letter, Mrs. Cappadocia describes herself as a "travel consultant" for a registered travel agent, Ital Travel, whose payments were being received by Trendy Holidays too late for tickets to be issued. As a result, Mrs. Cappadocia stated she reached an agreement with the Vice-President of Trendy Holidays, Mr. Alfonso Dickey, to send payments directly via money order to ensure that tickets were issued on a timely basis.

She admitted under cross-examination that she was aware that employees of Ital Travel were not permitted by their employer to take money directly from the public. However, she stated that she performed these transactions in good faith, unaware that Trendy Holidays had any financial difficulties.

Director's Certificates were entered into evidence that Rosemary Cappadocia was never registered as a travel agent or travel wholesaler under the Act. Furthermore, Trendy Holidays was never registered as a travel agent under the Act. However, it was registered as a wholesaler from January 5, 1993 until July 21, 1993, at which time its registration was terminated.

Counsel for the Board argued that all of the evidence supports the contention that Mrs. Cappadocia was selling travel services directly on behalf of Trendy Holidays. Counsel noted that Mrs. Cappadocia, who admitted under cross-examination that she completed the Claim Form for Mr. Mazzone, wrote in response to the question asking for the name of the travel agent from which the travel services were purchased: "Booked direct to Trendy Holidays by Rosemary Cappadocia, sales rep". The same phrase appears on the Claim Form for Mrs. Rotondi. Counsel for the Board also referred to a copy of the accounts receivable record of Trendy Holidays obtained when it closed its door, which was entered into evidence. This record shows the names of both Applicants appearing in the column marked "Trendy Direct".

Ms. Rossi for the Fund further testified that she was informed by the manager of Ital Travel that Mrs. Cappadocia was not an employee and was not entitled to accept money directly from the public. Although this evidence is hearsay, counsel for the Board argued that the evidence as a whole suggests that Mrs. Cappadocia was not selling travel services on behalf of Ital Travel. Counsel referred to copies of documents used in transactions between Ital Travel and Trendy Holidays, which were entered into evidence, for example, a receipt by Ital Travel for travel services through Trendy Holidays. This Ital Travel receipt differs substantially from the personal receipts issued by Mrs. Cappadocia to the Applicants.

This Tribunal, upon all the evidence, finds that Mrs. Cappadocia was not acting as an employee of Ital Travel, when she received payment from the Applicants for travel services. On the contrary, the evidence supports a finding that Mrs. Cappadocia was selling travel services directly on behalf of Trendy Holidays at the material time.

Thus, the Tribunal finds that both Applicants made payment for travel services to Rosemary Cappadocia who, at the material time, was neither a registered travel agent in Ontario nor was she acting as an employee of a registered Ontario travel agent. Furthermore, Mrs. Cappadocia was not a "participant" as defined in section 1 of the Schedule as: "any travel agent or travel wholesaler who is a subscriber to the Fund with the approval of the Registrar".

Counsel for the Board referred to the Franco Dorio case, decided by this Tribunal on March 16, 1994, in which the facts and legal issues are very similar. In that case, the Tribunal found that the same Rosemary Cappadocia was not an employee of Ital Travel, nor was she a registered travel agent or a participant in the Fund, at the time that she received payment directly from the applicant for tickets through Trendy Holidays. The Tribunal

reviewed the caselaw and found substantial support for its ruling that the applicant was disentitled to compensation upon the basis of section 15(1), paragraph 1 of the Schedule to Regulation 1085 under the Act.

This section, set out above, requires that the Applicants pay for travel services to a "participant who is a travel agent in Ontario", in order to be eligible for compensation. Neither Rosemary Cappadocia nor Trendy Holidays, a registered travel wholesaler and participant in the Fund at the material time, meet this requirement. Both "travel agent" and "travel wholesaler" are defined under section 1 of the Act and it is clear that they are not one and the same for the purposes of section 15(1), paragraph 1 of the Schedule.

Mrs. Mazzone on behalf of Mr. Mazzone argued that the public is inadequately protected under the Act, which is designed to protect consumers, because there was no way of knowing that good faith dealings with Mrs. Cappadocia would result in disentitlement to compensation. This Tribunal is sympathetic to these Applicants. However, this Tribunal is bound to apply the law that governs and limits the capacity of the Fund to compensate members of the travelling public.

Accordingly, by virtue of the authority vested in it under section 17 of the Schedule to Regulation 1085 under the Travel Industry Act, the Tribunal upholds the decision of the Board of Trustees to deny the claim for compensation by both Applicants.

SLOBODAN MITROVIC

APPEAL FROM A DECISION OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding

APPEARANCES:
SUSAN CAMPBELL, representing the
Travel Industry Compensation Fund
No one appearing for the Applicant

DATE OF
HEARING: 23 November 1994 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund. This decision was set out in a letter to the Applicant dated January 27, 1994. This date was fixed for a hearing to commence at 2:00 p.m. and, as appears from Exhibit 5, a copy of the Notice of this hearing was delivered by Purolator Courier to the Applicant at his address on October 5, 1994.

No one appearing for the Applicant by 2:30 p.m. in the afternoon, upon the application of counsel and upon the presentation of evidence on behalf of the Respondent, by virtue of the authority vested in it by the provisions of the Travel Industry Act and Regulations made thereunder, the Tribunal directs the Board of Trustees of the Ontario Travel Industry Compensation Fund to disallow the claim of the Applicant.

MOHAMED, MR. H. DAHIR

APPEAL FROM A DECISION OF
THE BOARD OF TRUSTEES UNDER
THE TRAVEL INDUSTRY ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES:

MR. DAHIR MOHAMED, appearing on his own
behalf, assisted by his interpreter,
Mr. Abdi Abdi

MS. SUSAN CAMPBELL, counsel representing
the Board of Trustees

DATE OF
HEARING: 16 August 1994 Toronto

REASONS FOR DECISION AND ORDER

Mr. Dahir Mohamed appeals a decision by the Board of Trustees of the Compensation Fund under the Travel Industry Act (the "Act") to deny him compensation of \$865.00. Mr. Dahir Mohamed, through his interpreter, testified that he paid this amount to Addar Tours Travel Agency on October 16, 1992, for one return flight, Toronto-Cairo.

In its decision letter dated 28 January 1994, the Board relied upon the new Regulation 806, which according to Part 1V came into force on December 9, 1993. The Board denied the Applicant's claim for compensation on the following grounds:

- 1) Mr. Dahir Mohamed's claim was not timely because he failed to give notice in writing of his claim within six months after the event which gave rise to his claim, as required under section 53 of Regulation 806. The Board regarded the date that Mr. Dahir Mohamed cancelled his reservations with Addar Tours, being October 30, 1992, to be the event giving rise to his claim. The filing deadline was thus May 1, 1993, and it was not disputed that Mr. Dahir Mohamed filed his claim with the Board on August 9, 1993.
- 2) Additionally, the Board found that the requirements of section 50 of Regulation 806

were not met because the Applicant failed to provide sufficient documentation to substantiate his claim that payment had been made for travel services and that a refund was forthcoming from Addar Tours.

Mr. Dahir Mohamed testified that he purchased the return ticket from Addar Tours, upon the condition that he would receive a refund if he was unable to use the ticket. This occurred when he was refused a VISA and he stated he cancelled his reservation on October 30, 1992. The Applicant testified that he delayed filing his claim for compensation because he relied upon assurances from Addar Tours that he would receive a refund. After Addar Tours ceased operations in June 1993, the Applicant filed his claim for compensation with the Board of Trustees on August 9, 1993.

In support of his claim, Mr. Dahir Mohamed provided a copy of a cheque payable to "Addar Company" in the amount of \$865; the date of the cheque appears to be October 6, 1992. He could provide no receipt, invoice, unused ticket or any other documentation to evidence his claim.

Ms. Nanci Rossi, Claims Manager for Fund, testified that she had processed other claims arising out of the closure of Addar Tours and that these claims were supported by receipts, notably absent here. She further stated that her claims investigation respecting Addar Tours led her to believe that Addar Printing was operated in conjunction with Addar Tours; in this context, she asked the Tribunal to note that Mr. Dahir Mohamed's cheque was payable simply to "Addar Company".

Additionally, Ms. Rossi, relying upon her extensive experience in the travel industry, stated that ticket documentation will detail what cancellation penalties, if any, apply to the particular ticket. She stated that some tickets, if deeply discounted, may be subject to cancellation penalties equal to 100% of the ticket price, making the ticket non-refundable. Due to the lack of documentation here, the Board was unable to ascertain what conditions, if any, applied to the Applicant's ticket purchase.

Counsel for the Board argued that the Applicant was disentitled to compensation for reasons in addition to those cited above. Under Regulation 1085, the Applicant's delay in filing his claim within six months of Addar Tours' "refusal or failure to pay" was fatal to his claim, according to counsel. Further, it was argued that this Tribunal did not have the jurisdiction under Regulation 1085 to hear an appeal respecting the timeliness of the Applicant's claim.

Additionally, counsel argued that section 50(3), paragraph 4 of the new Regulation 806 prohibited the payment of compensation "for a payment, including a non-refundable payment, for travel services that were available but not received if the failure to receive the travel services is due to the customer's or the traveller's action or failure to act". It was argued that Mr. Dahir Mohamed's failure to obtain a VISA rendered him responsible for his inability to use his ticket.

In the face of arguments disentitling the Applicant upon several grounds, this Tribunal finds that the Applicant is disentitled to compensation because he has failed to substantiate his claim. The Applicant has not presented sufficient evidence, including documentary evidence, that he made a payment to Addar Tours for travel services. This is requisite whatever regulatory scheme applies. The Applicant presented only a copy of a cheque payable to "Addar Company", which may or may not be the same entity as Addar Tours. The Applicant failed to provide any other evidence, such as sufficient detail in testimony, or documents, such as a receipt, invoice or unused ticket, to corroborate the requisite purchase of travel services.

Given the Tribunal's decision, it is not necessary to determine the issues of the timeliness of the Applicant's claim, under either Regulation 1085 or Regulation 806, or the impact of the Applicant's conduct in the non-receipt of the travel services.

Therefore, by virtue of the authority vested in it under the Travel Industry Act, the Tribunal upholds the decision of the Board of Trustees to disallow the Applicant's claim for compensation.

MOTOKOV CANADA INC.

IN THE MATTER OF A DECISION
OF THE TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW THE CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding
GERRY BEECH, Member
PETER BONCH, Member

APPEARANCES: DAVID M. GOODMAN, counsel, representing
the Applicant

SUSAN CAMPBELL, counsel, representing the
Travel Industry Compensation Fund

DATE OF
HEARING: 23 August 1993 Toronto

REASONS FOR MAJORITY DECISION AND ORDER

Motokov Canada Inc. (the "Applicant") appeals a decision by the Board of Trustees of the Ontario Travel Industry Compensation Fund (the "Board") denying the Applicant's claim for compensation. At stake is the Applicant's claim in the amount of \$14,522.00 in US funds and \$8,861.38 in Canadian funds.

The parties do not dispute the facts, including the amount of the Applicant's claim. No oral evidence was presented by either party. The parties instead relied upon an Exhibit Book of Documents prepared on behalf of the Fund to sketch in the agreed-upon facts.

It is not disputed that the Applicant purchased travel services from The Incentive Design Company Ltd. ("Incentive") in 1991 and paid in excess the amounts claimed above.

A Director's Certificate, pursuant to section 26 of the Act, was received into evidence before this Tribunal as proof that "The Incentive Design Company Ltd." was registered as a travel agent under the Act from May 28, 1981 to April 18, 1989. Registration was still terminated for The Incentive Design Company Ltd. as of the date of the Certificate, being 26 July 1993.

Thus, there is no dispute that during the relevant period in 1991 the Applicant purchased travel services from a travel agent that was not registered under the Act.

The same Director's Certificate notes that "The Incentive Design Company Ltd" operated as The Incentive Design Company/Executive Travel Centre out of a Bloor Street West address in Toronto.

A second Director's Certificate, entered pursuant to section 26 of the Act, shows that "Executive Travel Centre Inc." was registered as a travel agent from April 19, 1989 to April 19, 1993, at which time registration was terminated. This entity operated out of a Banigan Drive address in Toronto, which is the same address that appears on the letterhead of The Incentive Design Company Ltd. in 1991 in correspondence to the Applicant.

By letter dated 15 July 1992, the Applicant received notice that The Incentive Design Company Ltd. was in receivership, with no funds available for distribution to the Applicant.

In its decision letter, dated December 24, 1992 the Board determined that the Applicant's claim was ineligible because of Incentive's non-compliance with Section 15(1) subsection 1 of the Schedule titled "TERMS OF COMPENSATION FUND" ("the Schedule") Regulation 1085 ("the Regulation") pursuant to the Act.

Section 15(1) of the Schedule says in part:

15.-(1) The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay, provided that the claims meet the following requirements:

1. A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of moneys so paid..."

In its decision letter dated December 24, 1992 the Board quotes the above portion of the Section and goes on to say the following:

At the time of the purchase [by the Applicant] this company [Incentive] was not a registered travel agent and was therefor not a participant in the ... Fund.

The Board clearly believes that the clients of travel agents who are not registered under the Act are not entitled to the protection of the Compensation Fund. The issue in dispute is whether the governing legislation allows compensation to be withheld from an applicant otherwise entitled to it solely on the basis that the applicant's travel agent failed to meet his obligations under the Act.

In deciding this issue, the Tribunal must be guided by Section 10 of the Interpretation Act, which states:

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything which the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

In order to understand the "... object of the Act according to its true intent, meaning and spirit...", it is helpful to look at the legislative history. The Act (fully titled "An Act to regulate the Business of selling and dealing in Travel Services") was introduced into the Legislature and given first reading on December 5, 1974. The Minister of Consumer and Commercial Relations made a statement in the Legislature on that day in which he said in part: (emphasis added throughout)

This new act will initiate a comprehensive system designed to **protect the travellers deposits** and provide him with sound information on travel services, and upgrade industry practices.

For some time now, my ministry has been **extremely concerned about the irresponsible selling and administrative procedures used by some travel agents and travel wholesalers...**

In the past several months, Mr. Speaker, a thorough examination of the Ontario travel industry has been conducted by my parliamentary assistant...

The conclusion of our review is that **no one is acting very effectively for the consumer. This situation must be changed, and the change will be most effective at the point of sales,**

where the consumer gets his ticket and his information...

The problems with the travel industry are legion...

If something goes amiss, the consumer is the one who loses, because there is rarely any money left to compensate him for his loss...

The new legislation ... will propose five specific measures to strengthen the industry and increase its responsiveness to the consumer.

Firstly, the Act and its regulation will require provincial licensing of all travel agents, ... and travel wholesalers in Ontario...

Thirdly, regulations will be drafted to require that customers' deposits be protected.

Fourthly, an industry-financed compensation fund will be established for the benefit of customers whose travel funds have been abused...

I am certain that these measures will contribute significantly to the professional development of the travel industry. They will protect the many honest agents and tour operators as much as they will assist the consumer.

(Legislature of Ontario, Debates, 1974, Volume 5, pp. 6075 - 6077)

On December 10, 1974 the Act was given second reading. In the course of the debate, the parliamentary assistant to the Minister of Consumer and Commercial Relations said in part: (emphasis added throughout)

If a person makes a deposit on a trip and does not get their trip, what we are saying to them is: "You will get your money back..." We intend to protect those deposits...

If the trip ... does not come off and they (the travel agent or travel wholesaler) cannot repay and we have to repay out of the

compensation fund because of their default, for any reason; then Mr. Speaker, I suggest to you that person has seen his last day in the travel business...

Let's have no mistake about it. This is a 100% consumer bill...

(Legislature of Ontario, Debates, 1974, Volume 5, pp. 6253 - 6254)

Clearly, the Legislature intended to accomplish a number of things through passage of the Act. Among these are:

1. protection of monies deposited by consumers to pay for travel services subsequently not received;

2. reform of the travel industry.

It is these objectives which we must keep in mind in deciding this matter.

Turning to the issue in dispute, it must be noted that Section 15(1) of the Schedule does not state directly that compensation may be paid only to the clients of registered travel agents. Therefore, the Board's decision to refuse compensation can be upheld only if it can be said that the term "travel agent" as used in the subsection means only registered travel agent; or if the term "participant" as used in the Section means only registered travel agent; or if some other part of the Act, Regulation or Schedule requires that the Section be interpreted as the Board has done.

Turning first to the term "travel agent", Section 1 of the Act says:

1. In this Act, "travel agent" means a person who sells, to consumers, travel services provided by another person;

Section 3(1) of the Act makes registration an absolute requirement for travel agents but does not change the definition of "travel agent". An unregistered travel agent is acting in violation of the Act and is subject to the prescribed penalties (including, we might add, being forced out of business, fined and imprisoned). Nevertheless, if he is selling travel services, as defined, to consumers he is clearly a travel agent for the purposes of the Act. If he were not, the Act would have no power to regulate his activity.

We note also that there are only two places in the Act, Regulation and Schedule where the definition of travel agent is changed. These are in Section 12(3), (5), (6), (8) and (9) of the Regulation where the word "registered" is used as a modifier of the term "travel agent"; and in Sections 12(11), 13 and 14 of the Regulation, where the phrase "a person who is exempt under paragraph 2 of section 3" is given as the definition of "travel agent".

In our opinion, when the term "travel agent" is meant to be limited, the Act says so; when it is used alone, it may be interpreted to mean any person who sells "travel services" as defined in Section 1 of the Act, except those persons specifically excluded by Section 4(1)(c)(i) of the Act or Section 2 of the Regulation.

We turn next to the question of what the term "participant" means in Section 15(1) of the Schedule. Section 1 of the Schedule says:

1. In this Schedule, "participant" means any travel agent ... who is a subscriber to the fund with the approval of the Registrar;

Counsel for the Applicant argued that the Board's interpretation of the Schedule creates two classes of consumer, one protected under the fund because it deals with registered travel agents and one excluded from such protection because it does not. Further, Counsel argued that this was not in keeping with the intention of the Act. Counsel for the Board agreed that the interpretation of the Schedule excludes one group of consumers from the Act on the basis of whether or not they are dealing with a registered travel agent, but argued that this was in keeping with the intent of the Act.

The arguments of Counsel for the Board seem to rest on the assumption that the phrase "... subscriber to the fund with the approval of the Registrar" in the definition of the term "participant" in Section 1 of the Schedule must be interpreted to mean "registered under the Act".

We disagree. In our view, the phrase refers solely to the non-profit travel agents referred to in Sections 3(2), 12(11), 13 and 14 of the Regulation. Since such persons may not be in a position to contribute to the Fund in the same manner as ordinary travel agents, the Registrar is empowered to approve or refuse extension of the protection of the Fund to their clients. Otherwise, Section 15 of the Regulation is quite clear; participation in the Fund is mandatory for all travel agents.

We turn finally to the question of whether any part of the Act may be said to require an interpretation of Section 15(1) of the Schedule which is consistent with the Board's interpretation in this matter. We can find no part of the Act, Regulation or Schedule which requires that Section 15(1) of the Schedule must be interpreted to mean that only clients of travel agents registered under the Act are entitled to claim compensation from the Fund. In our opinion, no such part exists.

It must be noted here that Section 3(1) of the Schedule does impose a limitation on participation in the Fund. Section 3(1) of the Schedule says:

3. The following are eligible to participate in the fund:

1. Any travel agent who is registered or entitled to be registered under the Act.

Clearly, persons identified by Section 4(1)(c)(i) of the Act (and not exempted by Section 3 of the Regulation) and by Section 2 of the Regulation are not eligible for participation in the Fund by virtue of being specifically excluded from the jurisdiction of the Act. Except as noted above however, we can find no other basis for the exclusion of consumers of travel services from the benefit of the Fund.

It should be noted that no evidence was led by counsel for the Board that Incentive was not eligible for registration under the Act at the time that it sold travel services to the Applicant.

As noted above, one of the intentions of the Legislature in enacting the Travel Industry Act was to protect the deposits of the consumers of travel services. To find that unregistered travel agents are excluded from the definition of "participant" in Section 1 of the Schedule prevents implementation of that intention, as evidenced by the facts in the matter before us.

In addition to protecting consumer deposits, the Legislature in passing the Act also intended to reform the travel industry. In order to do this economically, the Act requires the active co-operation of the industry in the regulatory scheme created and provides the Registrar and the Director with powerful tools to compel that co-operation. In our opinion, the Board's ruling in this matter sidesteps the use of those tools and undermines the Act's attempt to reform the travel industry.

We note that Section 17(1) of the Act, Section 12(8) of the Regulation and Sections 18(2), (3) and (6) of the Schedule,

among others, may be used to protect the Fund from abuse by unscrupulous travel agents. In our opinion, it is to these provisions that the Board must turn to resolve the issues created by the Applicant's request for compensation rather than to a refusal of that request.

The Travel Industry Act regulates a commercial activity and anyone engaging in activity defined in Section 1 of the Act is, in our view, subject to all of the provisions of the Act, unless they are specifically exempted from some or all of them. If the Legislature had wanted to exempt unregistered travel agents from their obligations to the Compensation Fund, it could have said so clearly and explicitly. It did not do so.

In our opinion, the Act does not permit the Board to refuse compensation to an applicant otherwise entitled to receive it solely because the applicant's travel agent has failed to meet some or all of the obligations imposed on him by the Act.

Therefore, by virtue of the authority vested in this Tribunal by Section 17(3) of the Schedule to Regulation 1085 made pursuant to the Travel Industry Act, we overturn the decision of the Board of Trustees of the Travel Industry Compensation Fund to deny compensation to the Applicant and direct that the Applicant's claim be paid in full.

Gerry Beech, Member
Peter Bonch, Member

REASONS FOR DISSENTING DECISION

The majority decision sets out the facts of this matter, which are not in dispute.

However, with respect, I differ from my colleagues in both reasoning and result.

In my view, the governing legislation as currently drafted, no matter what the legislative intent, does not allow compensation to be paid to an applicant who purchases travel services from a travel agent who, at the time of purchase, was neither registered nor participating in the Fund.

Turning to the Board's decision dated 24 December 1992, the Applicant was denied compensation because of non-compliance with the Travel Industry Act (the "Act") and Regulation 1085 thereunder, in particular, section 15(1), subsection 1 of the Schedule entitled "Terms of Compensation Fund", made under the Regulation. The relevant portions of section 15(1), subsection 1 are set out:

15.-(1) The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of the participant that the participant has refused after demand to pay, provided that the claims meet the following requirements:

1. A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of money so paid....

Specifically, the Board found that at the time the Applicant purchased the travel services from The Incentive Design Company Ltd., it was not a registered travel agent and therefore was not a "participant" in the Fund.

Counsel's argument on behalf of the Applicant was two-pronged and based on statutory interpretation.

Firstly, counsel stated that the rationale for the creation of the Fund is to protect the public. I agree.

However, according to counsel, the Schedule to the Act attempts to create two classes of consumers: one class is protected

under the compensation fund because those consumers deal with a registered travel agent who is a "participant" in the Fund; one class is not protected because its consumers deal with a non-registered non-participating travel agent.

In the view of counsel, such a statutory interpretation results in lack of protection for certain consumers; this interpretation defies the legislative intent, which was remedial and aimed at consumer protection.

The second argument put forward by counsel for the Applicant was that such an interpretation allows the Schedule to the Regulation to attempt to change the substantive law under the Act. According to counsel, the Schedule is subsidiary to the Act, yet attempts to achieve a result that is inconsistent with both the remedial intent and a proper reading of the Act.

The Act, according to counsel, mandates both registration and participation in the Fund. However, the Schedule suggests that participation is optional under certain circumstances.

In response to the first argument, counsel for the Fund concurs that section 15(1), subsection 1 of the Schedule to the Regulation does create two such classes of consumers. I agree.

The legislators could have chosen to draft the entire Schedule to the Regulation so that no reference was made to "participants". Such drafting would support the argument that the Fund is a general insurer for the benefit of the public who consume travel services under circumstances that include payments to non-registered, non-participating travel agents.

Thus, the payments into the Fund by registered, participating travel agents, who comply with the Act and regulation thereunder, could be used to pay the claims of the clients of non-registered, non-participating travel agents who do not comply with the law.

However, the legislators chose to state that the fund stands in the place of the "participant". Thus, the meaning of the word "participant" is key. "Participant" is defined under the Schedule to mean any travel agent who is a "subscriber to the fund with the approval of the Registrar". Under the subheading: "Eligible Participants", section 3 of the Schedule states that: "Any travel agent who is registered or entitled to be registered under the Act" is eligible to participate in the Fund.

These definitions suggest that two criteria must be met in order to be a "participant" for the purposes of the fund. A travel agent 1) must be registered (or entitled to be registered);

and 2) must subscribe to the fund with the approval of the Registrar.

It was agreed that The Incentive Design Company Ltd. was neither registered nor subscribing to the Fund with the approval of the Registrar. Therefore, in my view, The Incentive Design Company was not a "participant" for the purposes of the fund.

Under section 15(1), subsection 1 of the Schedule, in order to be eligible for compensation, the Applicant must have "made payment for travel services to a participant who is a travel agent in Ontario...."[emphasis added]. Because the Applicant did not deal with a "participant" for the purposes of the fund, the fund is not available to the Applicant to provide compensation.

Furthermore, the term "travel agent", when used alone without being expressly modified by the word "registered", does not in my view mean "unregistered travel agent". Thus, the use of the term "travel agent" standing alone, in my interpretation of section 15, subsection 1 of the Schedule to the Regulation, does not imply "unregistered travel agent".

It is agreed that throughout section 12 of the Regulation the word "registered" is used to modify the term "travel agent". It is further noted that throughout the balance of the Act, the term "travel agent" is used generally without the modifier "registered".

However, to interpret the term "travel agent" as meaning "unregistered travel agent", unless otherwise specified, means that most of the Act deals only with non-registered travel agents and their rights and obligations under the statutory scheme.

Section 12 of the Regulation can be interpreted as providing the express details of the "Terms and Conditions of Registration". Thus, express reference will be made in that section to the state of being registered.

Under the subheading: Terms and Conditions of Registration, section 12 of the Regulation details the obligations imposed on registrants. These obligations help ensure that the public is protected when consuming travel services. For example, under subsection 12(1), registration expires automatically upon the date of expiry on the certificate of registration unless an application for renewal is made in time; under subsection 12(5), registered travel agents are prohibited from carrying on business in a name other than the one registered; under subsection 12(6), registrants must "prominently display" the certificate of registration at the office for which it was issued.

In response to the second argument on behalf of the Applicant that the Schedule to the Regulation is attempting to change the substantive law under the Act, I disagree.

On the contrary, the Schedule is not inconsistent with the Act in my view. In my view, there is no apparent inconsistency between the Act, which mandates registration, and the Schedule, which details participation. Further, the issue is not relevant to the facts at issue because the travel agent here was neither registered nor participating.

Counsel for the Fund cited the case of Vanda Beauty Counselor, decided by this Tribunal on August 8, 1978. In that case, the applicant was found to be ineligible for compensation under the fund because it had dealt with a travel agent prior to its registration under the Act. The Tribunal dismissed the argument that the Fund was "an insurer for all claims of clients of any travel agent...who was registered for one single period of time and who had only paid into the Fund the initial payments".

The premise of this argument appears to be simply this: a travel agent, if registered and participating at any point in time, can then rely upon the fund to insure its dealings with the public at any point in time before or after such registration and participation.

I agree with the position taken earlier in the Vanda Beauty Counselor case that such an interpretation would be absurd under the legislation as presently drafted.

Furthermore, I adopt the position taken in the earlier case of Frank Hargarten, decided March 1, 1982. There the Tribunal considered "whether the Registrar or Trustees were bound to communicate to the public at large that the protection afforded by the Act and the Fund established under its provisions was terminated concurrently with the lapsing of the registered travel agent's registration.... The Tribunal finds that the protection afforded by the Fund did lapse with registration and that the Act imposes no duty of communication to the public at large".

Counsel for the Fund referred to another case, Onkar Travels, decided December 5, 1986, in which the good faith dealings of the unsuccessful applicant were acknowledged, as they are here.

However, despite such sympathy, it is my position that I am bound by the limits of the law that the drafters clearly intended to apply and that this Tribunal does not possess the authority or discretion in law to extend coverage beyond those limits.

Therefore, by virtue of the authority vested in this Tribunal by section 17(3) of the Schedule to the Regulation to the Travel Industry Act, this Tribunal, in my opinion, should uphold the decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund to deny compensation to the Applicant.

Theresa M. Walsh
Vice-Chair, presiding

The above decision was appealed to the Ontario Court (General Division) Divisional Court. The appeal had not been concluded at the time of this publication.

BUDIMIR NIKOLIC

APPEAL FROM A DECISION OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
HERBERT ROBERTSON, Member
PETER BONCH, Member

APPEARANCES:

BUDIMIR NIKOLIC, appearing on his own behalf

SUSAN CAMPBELL, representing the
Travel Industry Compensation Fund

DATE OF

HEARING: 9 November 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund set out in a letter from the Manager of the Fund to the Applicant dated February 1, 1993. The relevant facts are not in dispute.

The Applicant, who had come to Canada from Yugoslavia quite a number of years ago wished to have his parents come here for a visit in 1992. On April 2, 1992, he made an arrangement with the office of JAT - Yugoslav Airlines in Toronto whereby he paid to it the sum of \$1,730 and it issued to his parents in Yugoslavia return tickets to fly from Belgrade to Toronto and, in due course, returned to Belgrade. The tickets were provided and the two travellers came to Toronto. While they were here and before the time had arrived for their return flight, developments took place in Yugoslavia which caused the United Nations to call upon member states, including Canada, to impose certain sanctions against Yugoslavia and its successor states. The Canadian Government complied with this request and applied sanctions including a sanction prohibiting JAT from landing in Canada.

As a result of the disruption of its business by the

sanctions throughout the world and the turmoil at home, JAT ceased operations and was apparently without funds to make any reimbursements and, in any event, is not making any. The Applicant's parents had to return to Yugoslavia and the Applicant was forced to pay for a return flight on another airline. He did this by purchasing through a travel agent 747 Travel Agency two tickets on Bulgarian Airlines for \$1,240 for his parents return on July 15, 1992 from Ottawa through Sofia to their home. The Applicant claimed \$825 from the fund as being the value of the unused two return portions of the original tickets purchased from JAT. To succeed with such a claim, an Applicant must bring his claim within the provisions of Section 15(1) of the Schedule setting out the terms of the Compensation Fund and forming part of Ontario Regulation 1085 made pursuant to the Travel Industry Act. This subsection provides in part:

15.—(1) The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay, provided that the claims meet the following requirements:

1. A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of money so paid to the extent only that such services are not so provided and after the client has made a demand for payment from the participant that the participant has refused without legal justification to pay or is unable to pay by reason of bankruptcy or insolvency

A participant in the fund is described in section 1 of the Schedule:

"participant" means any travel agent or travel wholesaler who is a subscriber to the fund with the approval of the Registrar.

It was established by the evidence and particularly by a Director's Certificate dated November 3, 1993 that JAT Yugoslav Airlines was never registered as a travel agent or travel wholesaler under this Act.

Counsel for the Board of Trustees referred us to a number of authorities.

In the Vanda Beauty Counsellor case (1978) 7 CRAT 79, the Applicant had arranged with a company called Excelsior International to provide travel arrangements to the Canary Islands for some 220 of its sales personnel and put up \$10,000 by way of a deposit. The flight was to leave Montreal January 8, 1976 and return January 16, 1976. Before the date of the trip, the whole

thing was cancelled on November 29, 1975 due to an unsettled political situation in that part of the world. The Applicant was not able to recover the money from Excelsior as it appeared to be judgement proof and made a claim on the Compensation Fund. At p. 80, the Tribunal stated:

...The Tribunal found that Excelsior was not registered as a travel wholesaler and hence was not an eligible participant in the Compensation Fund at the material times having only become so registered and eligible on March 16, 1976.

In the case of Frank Hargarten (1982) 11 CRAT 204, the Tribunal states at p. 204:

This has been a claim against the Compensation Fund established pursuant to the Travel Industry Act.

The claimant Frank Hargarten booked a west coast cruise for himself and his wife through a registered travel agent (Lincoln Travel Associates) at a cost of some \$2,434.00 and paid \$609.02 as a deposit on January 19, 1981. The balance, some \$1,825.00, was paid later, on April 8, 1981.

Between these two dates, namely, on March 23, 1981, the registration (under the Act) of the Travel Agent was voluntarily surrendered.

The Board of Trustees refunded the original deposit, the said \$609.02, to the claimant on the grounds it had been made during the currency of the Registrant's registration under the Act but refused to repay to the claimant the said further sum of \$1,825 on the grounds that it was a payment which had been made at a time when the Registrant was no longer registered, at a time when the fund was therefore not liable under the terms of the Statute.

and on p. 205:

The Tribunal views this as a sad case in which the claimant and his wife appear to have been victims. We understand how they may have believed that their final payment was protected and would have been happy to have been able to help them but upon due consideration of the Statute establishing the Compensation Fund, its provisions and how it operates, we are unable to discover the grounds upon which this would be possible.

The Tribunal reluctantly directs that the claim be and the same is hereby disallowed.

Finally in the case of Onkar Travels (1986) 15 CRAT 237, a travel agent had paid \$43,340 to a travel wholesaler which failed to deliver the travel services and the Board of Trustees denied a claim upon the fund. The Tribunal said at p.237:

Under subsection 15(2) of the Schedule, where a claim is made against the Compensation Fund by a travel agent who has passed funds to a travel wholesaler, in order for the claim to succeed, it must first be established that both the travel agent and the travel wholesaler were participants at the time that the funds were passed. A participant is defined in the Schedule as any travel agent or travel wholesaler who is a subscriber to the Fund with the approval of the Registrar. While the claimant was clearly a participant, the evidence before us indicates that the wholesaler was not a participant.

The claimant has argued that it acted throughout in good faith without knowledge that Skybridge Tours was not a participant. This is not disputed by counsel for the Board of Trustees. While the Tribunal sympathizes with the claimant, its hands are tied in this matter. The Tribunal's authority extends only to claims which clearly fall within the terms of Section 15 of the Schedule. It has no authority or discretion to stretch the ambit of the coverage beyond the limits that the drafters of the Schedule clearly intended to apply.

As expressed in these cases cited, also in this case, the Tribunal has sympathy for the Applicant but cannot "stretch the ambit of the coverage beyond the limit that the drafters of the Schedule clearly intended to apply."

Therefore, by virtue of the provisions of section 17(3) of the Schedule under the heading "Terms of Compensation Fund" attached to Ontario Regulation 1085 enacted under the Travel Industry Act, the Tribunal directs the Board of Trustees of the Travel Industry Fund to refuse this claim.

MICHAEL PRETE

APPEAL FROM A DECISION OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding

APPEARANCES:

MICHAEL PRETE, appearing on his own behalf

SUSAN CAMPBELL, representing the Board of Trustees
of the Travel Industry Compensation Fund

DATE OF

HEARING: 19 July 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund made at a meeting on January 25, 1994 and set out in a letter to the Applicant dated January 27, 1994. The facts are not in dispute.

The Applicant and two other members of his family planned a vacation in July/August 1993 to visit his sister in Halifax. He had seen an advertisement by Triton Airlines Inc. of St. John's Newfoundland, advertising air flights between Toronto and Halifax and he talked several times on the telephone with someone in that company at a number given in the advertisement. As a result, he booked flights for three passengers from Toronto to Halifax on August 1, 1993 and returning to Toronto on August 15, 1993. On April 2, 1993, he sent Triton Airlines Inc., a money order for \$795.75 in payment therefor to its address in St. John's and received the tickets in the mail. Eight days before the flight was to depart from Toronto, Mr. Prete was advised by telephone that it would not be flying, but that he would be getting a refund of his money. In order to proceed with his family's vacation, he arranged the air travel through another air carrier and after his return to Toronto, he spoke several times to representatives of Triton Airlines Inc. about his refund. He received a number of promises, but no money.

The other relevant pieces of evidence to which I must refer is a Director's Certificate dated March 10, 1994, certifying that a search of the records on that date established that Triton Airlines Inc. never was registered as a travel agent or travel wholesaler in Ontario.

The facts of this case are on all fours with those in the case of Derek Hiltz, reasons for judgment issued on May 13, 1994, in which the Applicant paid his money to Triton Airlines for tickets on a flight which never took off. That claim was disallowed on the ground that it did not come within the Regulation which was Section 15(1) of the Schedule dealing with "Terms of the Compensation Fund" attached to Ont.Reg.1085 and which reads, in part, as follows:

15(1)- The fund is established to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay, provided that the claims meet the following requirements:

1. A client who has made payment for travel services to a participant who is a travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of money so paid to the extent only that such services are not so provided and after the client has made a demand for payment from the participant that the participant has refused without legal justification to pay or is unable to pay by reason of bankruptcy or insolvency...

This part of the Regulation is quoted on page 2 of that judgment and the Tribunal goes on to say:

There is no doubt that the Applicant paid his money for travel services and did not get those services. Unfortunately, this money was not paid to a "participant who is a travel agent in Ontario" and no recovery can be made from the Fund. This point has been clearly established by decisions of the Tribunal in the past.

The same result must follow here.

The new Regulation which came into force on December 9, 1993 leads to the same result. Section 50(1)(a) thereof reads:

- 50(1) A customer is entitled to be reimbursed for travel services paid for but not provided if,
- (a) the customer made payment for the

travel services directly to or through a registered travel agent.

Under the new Regulation, we are no longer concerned with the definition of a "participant". The requirement simply is that the payment must be made directly to or through a registered travel agent. Triton Airlines Inc. was not such an agent.

As has been stated in similar cases in the past, the Tribunal has a good deal of sympathy for the Applicant who lost his money in these circumstances. This, however, is not sufficient ground upon which to base a claim upon the Compensation Fund. Several facts must be understood in this regard. Before the Fund was put in place, the only party or parties against which the person bilked out of his money in this fashion had any recourse was parties against whom he had a claim at law for breach of contract. This Fund has not taken away any such rights and the Applicant still has such a claim against Triton Airlines Inc. Presumably, this would be of little avail because, although he would probably get a judgment against that company (if it still exists) for all damages suffered by him as a result of its actions, it is probably without assets and nothing could be collected from it.

The Ontario Travel Industry Compensation Fund does not provide insurance to all travellers in Ontario who may lose money paid for travel services not received. It only provides compensation for monies paid in circumstances which come within the Regulations. It is not funded by the Government of Ontario or with any public money. It is funded by Ontario registered travel agents and wholesalers who pay in money as a condition of their registration as such and only covers losses of money paid by a consumer to a registered travel agent.

Accordingly pursuant to the authority vested in it by the Travel Industry Act and the Regulations made thereunder, the Tribunal directs the Board of Trustees of the Ontario Travel Industry Compensation Fund to disallow this claim.

JOSEPH L. SANDERS

APPEAL FROM A DECISION OF THE ONTARIO
TRAVEL INDUSTRY COMPENSATION FUND
UNDER THE TRAVEL INDUSTRY ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding
GERRY BEECH, Member

APPEARANCES:
JOSEPH L. SANDERS, appearing on his own behalf

SUSAN CAMPBELL, counsel appearing on behalf of
the Board of Trustees of the Ontario Travel
Industry Compensation Fund

DATE OF
HEARING: 6 December 1993 Toronto

REASONS FOR DECISION AND ORDER

Mr. Joseph L. Sanders appeals a decision by the Board of Trustees of the Ontario Travel Industry Compensation Fund to deny his claim in the amount of \$767.50 for a lost air ticket.

The Board of Trustees, in a letter dated 12 April 1993, denied Mr. Sanders' claim on the basis that the conditions set out in section 15(1), subsection 1 of Regulation 1085 to the Travel Industry Act had not been "adequately substantiated". The particular regulatory condition for entitlement to compensation that had not been met was non-receipt of the "travel services contracted for".

Specifically, the Board was of the opinion that the Applicant had provided insufficient evidence to substantiate the non-receipt of travel services because he had failed to provide the original unused air ticket. According to the Board, it "has mandated specific minimum requirements in order to substantiate a claim and original unused air tickets is one such requirement".

The facts are not in dispute. Mr. Sanders testified at this hearing and was found to be a credible witness. There was no cross-examination.

According to Mr. Sanders, he purchased two sets of airline tickets for himself and his wife on September 25, 1991. These airline tickets were issued by JAT-Yugoslav Airlines. It was not disputed that Mr. Sanders originally paid \$3070.00 for both

sets of tickets. The first set of tickets for two flights (Toronto-Belgrade-Istanbul) was used.

On November 4, 1991, Mr. Sanders, upon his arrival in Moscow, claimed that he discovered that he had lost his portion of the second set of tickets. This lost airline ticket was for two flights (Moscow-Belgrade-Toronto). Mr. Sanders reported the loss immediately to the Moscow office of JAT-Yugoslav Airlines, which refused to issue a replacement ticket.

As a result, Mr. Sanders claims that his lost ticket was never used by him or replaced free of charge by JAT-Yugoslav Airlines. He thus claims the amount of \$767.50, which is the price of his portion of the original Moscow-Belgrade-Toronto ticket issued by JAT-Yugoslav Airlines. This claim forms the basis of his appeal here.

It is worth noting that the same amount of \$767.50 was paid as compensation by the Board to Mrs. Sanders. This was compensation for her unused original ticket (Moscow-Belgrade-Toronto). Although Mrs. Sanders did not lose her ticket, she was ultimately unable to use it when JAT-Yugoslav Airlines ceased operations. This occurred in the summer of 1992, upon the suspension of the landing privileges of JAT-Yugoslav Airlines in Canada.

Mr. Sanders also received compensation from the Board in the amount of \$945.00. This amount was the cost of the replacement ticket from JAT-Yugoslav Airlines, which Mr. Sanders purchased some four months after he lost his original ticket. He too was unable to use this replacement ticket because JAT-Yugoslav ceased operations in the summer of 1992.

It was not disputed before this Tribunal that the latter two losses were sufficiently evidenced and these two claims were thus properly compensated out of the Fund.

The issue then before this Tribunal is this: did Mr. Sanders present sufficient evidence to prove his entitlement to compensation for a lost ticket?

In the view of this Tribunal, the answer is yes.

It is clear that the onus is upon the Applicant to prove his claim on the balance of probabilities. Pursuant to section 15(1), subsection 1 of Regulation 1085 under the Act, the claimant must adduce sufficient evidence that he or she "has not received the travel services contracted for"; the claimant is then "entitled to claim for a refund of money so paid to the extent only that such services are not so provided".

This Tribunal found credible Mr. Sander's testimony under oath that he contracted and paid for certain travel services. This Tribunal also found credible Mr. Sanders' testimony that he did not receive these travel services because he lost his ticket.

This Tribunal was informed that the Board's policy is generally to refuse compensation for lost tickets. Ms. Nancy Rossi, Manager of Administration and Claims for the Ontario Travel Compensation Fund testified on behalf of the Board that in her experience the original unused airline ticket was always requested by the Board to substantiate a claim based on a lost ticket. Under such circumstances, ticketholders are thus required to look to the particular airline for a refund.

Mr. Sanders testified that he had attempted to deal with JAT-Yugoslav Airlines respecting the lost ticket for over a year without success. It is accepted that JAT-Yugoslav Airlines ceased operations in the summer of 1992, some seven months after Mr. Sanders lost his ticket.

Ms. Rossi testified on behalf of the Board as to her understanding of the general policies established by airlines respecting lost tickets. In her view, airlines usually establish policies for lost tickets that reflect the perception that airline tickets have a value similar to cash.

However, no evidence was adduced respecting the particular policy, if any, of JAT-Yugoslav Airlines for lost tickets.

According to Ms. Rossi, one requirement of such policies is that the ticketholder usually must swear a statement respecting the lost ticket. Additionally, she stated that refunds are often not provided before the expiration of the ticket's validity. In her view, this is because airline tickets are perceived to retain value over time: they can be used, cashed in or credited towards future travel. If the lost ticket is used during this waiting period, no refund will be granted to the ticketholder.

What seems implicit in these policies is that the risk of loss, if there is to be any, is placed upon the ticketholder, who may have been negligent in losing the ticket, as opposed to another party, including the ticket issuer.

Counsel on behalf of the Fund argued that the same principle should apply here. The Applicant is to assume responsibility for the loss that he has occasioned through his negligence in losing his ticket; this is opposed to the Fund, which by law is not a general insurer for all travel services.

Counsel on behalf of the Fund further argued that the Applicant's circumstances are analogous to those of a retail customer who purchases an item, only to lose it. Could such a customer reasonably expect a refund from the retailer to compensate her for her loss, without being required to return the original unused item? Again the risk of loss is apparently placed upon the negligent customer and not the retailer.

Such arguments may be compelling, based as they are upon defensible principles of apportioning the risk of loss among parties. Such arguments may be what underlies apparent Board policy to refuse compensation under all circumstances for lost tickets.

However, this Tribunal does not agree that this Board policy, applied without exception, is adequately supported by section 15(1), subsection of the Regulation under the Act. In the view of this Tribunal, it is an overly rigid interpretation of the applicable law to find that the only acceptable evidence of non-receipt of travel services is the production of the original unused ticket. It may be the best evidence but it is not the only evidence that will suffice, on the balance of probabilities, to discharge the onus upon the Applicant to substantiate entitlement to compensation from the Fund.

Furthermore, such a rigid legal interpretation leads to a rigid result. Effectively, under this policy, all claimants who lose tickets under all circumstances would seem to be disentitled from compensation. This is the result if the only acceptable evidence to the Board, in the case of a claim based on a lost ticket, is the production of the original unused ticket.

This particular Applicant has presented sufficient evidence through his unchallenged testimony, which was found credible by this Tribunal, of payment and non-receipt of travel services, to entitle him to compensation for his lost ticket.

Therefore, by virtue of the authority vested in it by section 17(3) of Regulation 1085 under the Travel Industry Act, this Tribunal directs the Board of Trustees of the Ontario Travel Industry Compensation Fund to allow the Applicant's claim.

SATNAM SINGH TAMBER

APPEAL FROM A DECISION OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
TO DISALLOW A CLAIM

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding

APPEARANCES:

SATNAM SINGH TAMBER, appearing on his own behalf,
assisted by his interpreter, Mr. Baldev Mutta

SUSAN CAMPBELL, representing the Board of Trustees
of the Ontario Travel Industry Compensation Fund

DATE OF
HEARING:

7 December 1994

Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals a decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund set out in its letter to him dated February 25, 1994. His claim for compensation of \$1250 was denied on the following grounds: 1) He filed the claim outside the six months following the event that gave rise to it, contrary to section 53 of Regulation 806; and 2) the requirements of sections 50 and 54 were not met in that insufficient documentation was submitted to substantiate that the Applicant paid for travel services to a registered travel agent and the services were not provided.

The Applicant testified that he planned to travel to India and on October 1, 1992 paid to Skybird Travel a deposit of \$1250, which was 1/2 the price of two airline tickets. The travel agent would not provide tickets to the Applicant until the balance was paid. The Applicant cancelled the reservations and asked for a refund of his deposit.

The travel agent issued two cheques to him which were dated December 10, 1993 and December 24, 1993 respectively. However, the Applicant was asked repeatedly to wait to deposit them since the travel agent was experiencing financial difficulties. On January 11, 1993, the first cheque of \$600 was returned NSF from the bank, and on March 8, 1993, the second cheque of \$650 was returned NSF from the bank.

The Applicant testified that the travel agent never refused to pay him back his money. Rather, he continued to delay

and said he would phone him when he had the money. The Applicant testified that he knew that Skybird Travel was out of business when the phone was disconnected in March, 1993.

Ms. Dorion Werda, an administrative coordinator with the Ontario Travel Industry Compensation Fund, testified that the Applicant's claim arrived on November 15, 1994. The Tribunal was referred to the Consumer Claim Form found in Exhibit No. 6 which had a date stamp confirming November 15, 1994 as the date of receipt.

It is not necessary that the Tribunal consider the second ground for the refusal of the Applicant's claim. The Tribunal finds that the Applicant's claim was filed late and must be denied for that reason. Section 53 of Regulation 806 provides:

A customer or registrant shall make a claim in writing to the Board of Trustee within six months after the event that gave rise to the claim.

As has been found by this Tribunal in previous decisions, the time limit specified in section 53 is absolute and the Tribunal has been given no authority to extend it. While the Tribunal may consider the various dates which arguably are tied to the event that gave rise to the claim, each of these dates requires that the claim be filed prior to November 15, 1994, the date of receipt by the Ontario Travel Industry Compensation Fund.

Whether the date on which the event that gave rise to the claim is October 10, 1992 when the Applicant was refused his tickets; or January 11, 1992 when the first cheque was returned NSF from the bank; or March 8, 1993 when the second cheque was returned NSF from the bank; or even sometime in March when the Applicant discovered that the travel agent's phone was disconnected; the latest possible date for filing would have been in September, 1993.

Accordingly, pursuant to the authority vested in it by the provisions of the Travel Industry Act and regulations made thereunder, the Tribunal directs the Board of Trustees of the Ontario Travel Industry Compensation Fund to disallow the claim of the Applicant.

PETER TILKOV

APPEAL OF A DECISION BY THE
BOARD OF TRUSTEES UNDER THE
TRAVEL INDUSTRY ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES:

PETER TILKOV, on his own behalf

SUSAN CAMPBELL, counsel, representing the
Board of Trustees

DATE OF

HEARING: 3 May 1994

Toronto

REASONS FOR DECISION AND ORDER

Mr. Peter Tilkov appeals a decision, dated May 6, 1993, by the Board of Trustees of the Ontario Travel Industry Compensation Fund, which determined that \$984.00 of his claim was ineligible for compensation.

The Board of Trustees relied upon section 15(1) of the Schedule to Regulation 1085 under the Travel Industry Act (the "Act") to determine that Mr. Tilkov was entitled to compensation in the amount of \$350.00 only.

For ease of reference, the relevant portion of section 15(1) is set out below:

A client who has made payment for travel services to a ... travel agent in Ontario and who has not received the travel services contracted for is entitled to claim for a refund of money so paid to the extent only that such services are not so provided....

Mr. Tilkov originally claimed the amount of \$1150 in U.S. Funds or what he calculated to be the equivalent in Canadian funds of \$1334.00. This amount represented the cost of alternate travel that Mr. Tilkov was required to arrange, after the failure of Jes Air to provide his prepaid return flight to Toronto from Bulgaria.

The evidence was that Mr. Tilkov originally paid \$740 in

Canadian funds to Trade Winds Travel, for a return ticket, Toronto - Sofia, on Jes Air. Mr. Tilkov testified that this price could not be matched. Upon arrival in Bulgaria, Mr. Tilkov stated that he was forced to endure additional delay, expenses and much frustration, before Jes Air clearly informed him of its financial collapse and consequent inability to provide the return flight. Mr. Tilkov testified that in order to return home he was forced to purchase a one-way ticket from Lufthansa for the price of \$1150 in U.S. funds.

The Board, in its decision letter, took the position that Mr. Tilkov had "received the transportation and therefore the value of a one-way portion of the return ticket for which [he] had paid, therefore the cost of the one-way portion (travel services received) was subtracted from the amount paid for a round-trip ticket (travel services paid for)". Thus, after taxes of \$40 were deducted from the \$740 originally paid by Mr. Tilkov for a round-trip flight on Jes Air, the Board reimbursed him \$350 in total, being the cost of the flight home that he did not receive from Jes Air.

In support of the Board's position, counsel cited the case of Fereydoon Mojaded-Shahrooz, decided by this Tribunal on September 21, 1993. In that case, another airline failure forced the applicant to purchase a one-way ticket home at nearly twice the original price. Counsel in that case, as here, did not challenge the reasonableness of the travel arrangements made under what were acknowledged to be difficult circumstances.

However, the Tribunal in Fereydoon Mojaded-Shahrooz agreed with counsel for the Board that section 15(1) of the Schedule to Regulation 1085 clearly excluded compensation for the cost of alternate travel services. Thus, the Tribunal upheld the Board's decision that the applicant was only entitled to compensation for half of the value of the original return ticket.

This Tribunal acknowledges the frustration asserted by Mr. Tilkov. In particular, Mr. Tilkov stated that he understood that the Release and Subrogation Form signed by him, allowing the Trustee under the Compensation Fund to be subrogated to all rights of recovery arising from the failure of Jes Air, would result in his total compensation claim being met out of the assets of Jes Air. When faced with the testimony of Ms. Rossi, Claims Manager for the Fund, that no monies had been recovered from Jes Air, Mr. Tilkov expressed frustration at the result that he, of all the parties, should be forced to bear the costs arising from the failure of Jes Air to provide him the travel service for which he originally bargained.

However, this Tribunal is bound by the Act that governs and limits the capacity of the Ontario Travel Compensation Fund to

compensate members of the travelling public. Important to this Tribunal's determination is that only the monies "so paid" by Mr. Tilkov to an Ontario travel agent, for travel services contracted for but not received, are eligible for compensation under the Act.

In the view of this Tribunal, the reasoning set out in the Fereydoon Mojaded-Shahrooz case applies equally well in the circumstances of Mr. Tilkov. Mr. Tilkov is entitled under the applicable law to be compensated only for travel services paid for and not received, that is, the amount of \$350, which is the amount he paid for a one-way ticket home on Jes Air that he did not receive from Jes Air.

This Tribunal finds that Mr. Tilkov is not entitled to claim compensation for the monies paid by him to another party, namely Lufthansa, in the amount of \$1150 U.S., for travel services that he did receive, that is, a one-way ticket home on Lufthansa Airlines.

Therefore by virtue of the authority vested in it under section 17 of the Schedule to Regulation 1085 under the Travel Industry Act, this Tribunal upholds the decision of the Board of Trustees of the Compensation Fund to disallow the Applicant's claim.

SIMA VESYOLY

APPEAL FROM A DECISION OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding

APPEARANCES:

ALEXANDRA GOZMAN, agent for the Applicant

SUSAN CAMPBELL, representing the Board of Trustees
of the Ontario Travel Industry Compensation Fund

DATE OF

HEARING: 27 July 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Board of Trustees of the Ontario Travel Industry Compensation Fund set out in its letter to the Applicant dated January 27, 1994. The evidence at the hearing was the following.

The first witness was Alexandra Gozman an employee of YYZ Travel Services (Int'l) Inc., a registered travel agent in Ontario with an office at 7000 Bathurst Street in Toronto. On May 21, 1992, the Applicant came into the office to make arrangements to bring her sister Ms. E. Pavlovic from Belgrade to Toronto for a visit. The Applicant had serious family difficulties because her husband was gravely ill with cancer and she wished to have her sister from Yugoslavia with her at this period of time. Ms. Gozman said that the Applicant told her that her sister was a senior citizen who spoke nothing but her native language and would not travel if she had to change aircraft at an airport where she could not understand the language spoken. It was necessary, therefore, to book her on a direct flight from Belgrade to Toronto and the only airline providing such flight was JAT - Yugoslav Airlines.

A flight was booked for May 30, being flight 562JAT. The return flight was left open and the arrangement was made that the return portion of the ticket was to be open and would be valid for one year from the date of the outgoing flight. Ms. Gozman had received \$1,264 from the Applicant and either on the very day that the sanctions were placed against JAT by the Canadian Government or at the earliest the day before, YYZ Travel Services (Int'l) Inc. delivered its cheque to the JAT office on Bloor Street and made the booking aforementioned. That Saturday night the sanctions were

announced which included an embargo against JAT flying in or out of Canada and the freezing of all of its assets here.

On Monday morning, Ms. Gozman contacted the JAT office on Bloor Street. At first she was told that JAT had many people stranded and that arrangements would be made to supply them with alternative flights. She was told that it could not refund the money because of the freezing of the assets. Discussions continued over a period of about two weeks, at the end of which JAT closed its offices in Toronto and no further contact could be made with it. Ms. Gozman said she encountered difficulties getting the claim upon the Compensation Fund filed. For some time, she was trying to get a refund from JAT and then the Applicant was out of Canada for sometime with her husband seeking medical assistance and sometimes when she contacted the Applicant about it, the latter was too upset and could not deal with it. In the result, the claim form was completed on July 27, 1993 and was received by the Compensation Fund on August 20, 1993.

The claim was presented to the Board of Trustees on January 25, 1994 and rejected for two reasons:

1. It was not filed within the time limited.

2. The Applicant had failed to comply with section 54(1) of the Regulation which had come into force on December 9, 1993 because she had not provided the evidence required to prove the claim. (see document 6 of Exhibit 5)

The next witness was Nancy Rossi, the Claims Manager of the Ontario Travel Industry Compensation Fund. She stated that the Applicant had not provided the documentation required in that she had produced neither any unused ticket or tickets nor any document which she called an MCO (Miscellaneous Charges Order). She said that it is the custom in the industry when a payment is made in one place for a ticket or tickets for someone to travel commencing at another place in the world for the airline to issue such an MCO. One copy is given to the purchaser of the tickets at the point of purchase and another copy is sent through to the office of the airline at the point where the traveller is to pick up the tickets and from which he will depart. She said that if the ticket is issued to the traveller, it may then be used to travel on that airline or, if not restricted, on another airline or may be cashed for a refund. If no ticket is issued, the MCO may be used by the purchaser to get a refund. She said this is why the Compensation Fund requires the production of one of these documents because, otherwise, it has no proof that someone did not get the benefit of a flight or a refund.

In reply, Ms. Gozman gave evidence that if any such

documents had come back to YYZ Travel Services (Int'l) Inc. for a refund, she would have known about this and that none such ever came.

Upon this evidence, I must deal with the application and the two defences raised on behalf of the Compensation Fund. It is clear that the defence was filed too late must succeed. Section 53 of the Regulation which came into force on December 9, 1993 provides:

A customer or a registrant shall make a claim in writing to the Board of Trustees within six months after the event that gave rise to the claim.

Under the regulation in force prior to this time, there was no appeal allowed to this Tribunal from a failure to make a claim on time. Therefore, if the issue were to be determined under the old Regulations, the Tribunal would have no jurisdiction to hear the matter. It does have jurisdiction under the new Regulation, but must find that this claim was filed out of time. The event which gave rise to the claim was the failure of JAT to carry the passenger from Belgrade to Toronto on May 30, 1992 and the claim was not made in writing to the Fund until August 20, 1993. Even if the evidence had been more fully developed to establish that during the two weeks or so that Ms. Gozman was talking with the JAT office in Toronto and the airline was assuring her that an alternative flight would be arranged so that one could find that the vital date was up to two weeks after May 30, 1992, the filing of the claim would still have been long outside the time limited. This time limited is strict and absolute and the Tribunal has no authority to relieve against it so the reasons for the delay are not relevant.

In view of this result, it is not necessary to deal with the second defence that the Applicant did not meet the requirements of Section 54(1) of the Regulations which reads as follows:

The claimant shall provide such evidence to the Board of Trustees as it may require to prove the claim.

It was conceded in argument by counsel for the Compensation Fund that the Regulation does not permit the Compensation Fund to act in an arbitrary manner in requiring such evidence, but that its requirements must be reasonable in the circumstances. Sufficeth to say that as a general rule, the requirement for the production of either the unused ticket or the MCO appears to be a reasonable one for the reasons given by Ms. Rossi. There might be exceptions made to this in special

circumstances but, because of my finding with regard to the first defence, I do not propose to make any finding in this respect with regard to the second defence. I would add that the issue to be determined would not have been whether on all of the evidence a balance of probability is that Ms. Pavlovic did not use the ticket and that the Applicant did not get a refund, but rather whether it is reasonable in these circumstances for the Compensation Fund to require the production of one of these documents mentioned and to refuse the claim when none were produced.

Accordingly, pursuant to the authority vested in it by the provisions of the Travel Industry Act and Regulations made thereunder, the Tribunal directs the Board of Trustees of the Ontario Travel Industry Compensation Fund to disallow the claim.

ANGELA BILODEAU

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding

APPEARANCES:

SCOTT MCLEOD, representing the Applicant

STEPHEN MARTIN, representing the Ontario
New Home Warranty Program

DATE OF

HEARING: 17 June 1994

Toronto

REASONS FOR RULING

This is an application to the Commercial Registration Appeal Tribunal under Section 10(8) of the Ministry of the Consumer and Commercial Relations Act to extend the time for the Applicant to file an appeal from a decision of the Ontario New Home Warranty Program pursuant to section 16(2) of the Ontario New Home Warranties Plan Act. The relevant facts are as follows.

The Applicant and her late husband Michael Bilodeau purchased a new home which was enrolled under and covered by the warranties set out in the Ontario New Home Warranties Plan Act. The transaction was closed and they took possession on August 25, 1989. On June 5, 1990 (within the time limited by section 13(4) of the Act), they gave written notice of certain defects in the home to the Program. The Program dealt with these and worked with the builder and Canada Mortgage and Housing Corporation, the vendor from whom the house was purchased and had many of these defects corrected. There remain, however, some outstanding items. On March 2, 1993, the Program wrote to the solicitors for Mr. and Mrs. Bilodeau advising of their decision that no further coverage was provided and advised of the purchaser's right of appeal to the Tribunal.

The solicitors for the Applicant then had some telephone conversations with certain officials of the Program in which it was indicated to the Program that the owners intended to retain an engineer to give them an expert opinion as to the defects still being alleged and it appears that the representatives of the Program agreed that, if they were given a copy of this report of this engineer, they would look at it and if deemed appropriate, revise the decision which they had reached. On June 8, 1993, the solicitors wrote to the Program and stated:

It was suggested and agreed that the best approach to seeking a resolution was to await the results of the engineering report, and then to schedule a meeting with CMHC, ONHWAP and our office. Without the aid of the report, an appeal to the tribunal would not be productive, and with the report a settlement may be reached without further litigation or appeal.

This understanding of the solicitors at the time is further amplified by a passage in a letter which they wrote to their clients on the same date June 8, 1993 in which they said:

Further to my letter of May 11, 1993, this is to advise that we have had recent discussions with Morley Thurston of Ontario New Home Warranty Program regarding the condition of your home.

We have advised him that we are retaining a structural engineer to inspect the home in order to determine what defects remain and what work must be performed. It is his recommendation that once the inspection has been completed, we should schedule a meeting with CMHC and ONWAP to discuss what action will be taken and by whom.

On July 6, 1993, Michael Bilodeau died and Mrs. Bilodeau had to pursue the claim by herself.

The report of the engineer, Mr. Finney was finally received on September 7, 1993. On November 1, 1993, the solicitor sent a copy of this to the Program and asked about attempting to negotiate a resolution at that stage. On November 22, 1993, the Program replied setting out a chronology of dates relevant to the matter from August 25, 1989 to June 8, 1993 and stated that the decision letter of March 2, 1993 set out the Program's position and was not appealed. On January 5, 1994, the solicitors wrote to the Program again as follows:

Further to my letter of November 1, 1993, I draw to your attention your telephone conversation with Mr. Nagel of our office on June 4, 1993. At that time it was indicated that we still wished to appeal the decision of the Program in not honoring my client's claim.

I confirm your discussions with Mr. Nagel wherein you indicated that once we had received our inspection report to attempt to arrange an appointment where all parties can sit down with a view of avoiding the appeal and any other necessary litigation.

I am prepared to meet with you to do so. I enclose a copy of the letter which I have received from C.M.H.C. and I simply do not believe that they are prepared to embark upon such discussions. I am holding all parties to their commitments that an attempt to negotiate resolution in this matter will be done without prejudice to my client's right to appeal.

Should you have changed your mind and not wish to meet with me to attempt to resolve this matter short of litigation, then regrettably I would advise that I intend to institute proceedings and plead this fact as being detrimental reliance. I trust that this will not be necessary and look to an opportunity to sit down with you to see if we can not resolve this unfortunate situation involving Mrs. Bilodeau.

The Program replied to this on January 17, 1994:

This is in response to your recent letter dated as received January 7, 1994. The correspondence to your office in the letter dated November 22, 1993 outlined the Program's position which has not changed. The appeal has not been denied by the Program, it is the Commercial Registration Appeal Tribunal which you must notify, this was clearly outlined in the decision letter dated March 2, 1993. Further discussion will not change the decision of the Program which we are prepared to defend.

On March 11, 1994, the solicitors wrote to the Program and to the Tribunal letters which requested a hearing pursuant to section 16(2) of the Act which reads:

(2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under section (1), notice in writing requiring a hearing to the Corporation and the Tribunal.

The decision letter was dated March 2, 1993 and 15 days thereafter was March 17. The time limited to launch this appeal expired on that date or at the latest only a few days later allowing sometime for the letter of March 2 to reach the solicitors to whom it was addressed. The Applicant now seeks an order here to extend the time **nunc pro tunc** to March 11, 1994 when they did file their appeal. The authority of the Tribunal to grant such an extension is found in section 10(8) of the Ministry of Consumer and Commercial Relations Act which reads:

10(8) Despite any limitation of time for the giving of any notice requiring a hearing by the Tribunal fixed by or under any Act, and where it is satisfied that there are apparent grounds for granting relief and that there are reasonable grounds for applying for the extension, the Tribunal may extend the time for giving the notice either before or after expiration of the time so limited, and may give such directions as it considers proper consequent upon such extension.

While no specific authorities were cited to me, both counsel agreed that the principles to be taken into account when considering such an application are those considered on a similar application in the Courts of Record and are that the Applicant must show:

1. That she had an intention to appeal within the time limited.
2. That the reason the notice of appeal was not served on time is such that the Applicant should be excused for not doing so and allowed to do it later if she did so as soon as the true situation was apprehended.
3. That there is not some overriding prejudice to the Respondent in the allowing of the application.

4. That there is a substantial point in issue and the Applicant has some reasonable chance of success.

On the first point, Mr. McLeod told the Tribunal that he had the instructions from his client within the 15 days and Mr. Martin stated that he accepted that without reservation so the Applicant has met this requirement.

On the second point quite a nice question arises. The usual grounds put forward in applications such as this one on this point are inadvertence on the part of the solicitors, that someone forgot what had to be done or forgot to do it and that the client should not suffer for such a mistake on the part of the solicitors. This is not the case here. While no cases were cited to me, I am aware of a decision given in or about 1958 by Roach J.A., (a very respected Judge) in the Ontario Court of Appeal in the case of Henry v. Hill which is helpful. In that case involving quite a substantial amount of money in the Supreme Court of Ontario, prior to a trial, an unusual order had been made referring 11 questions on a reference to a local Judge as referee. Later on a real question arose as to both the jurisdiction for and the appropriateness of this order. However, the reference was held and the Referee decided all or almost all questions in favour of the defendant. Counsel for the Plaintiff sought to appeal and the first question he had to consider was whether the Referee's Report was interlocutory or final because, if interlocutory an appeal lay to a single Judge in Weekly Court and could only be brought with leave and, if final he had an appeal as of right directly to the Court of Appeal.

Counsel decided that the Reference was an interlocutory proceeding and brought a motion for leave. This motion was heard and judgment was reserved for over six months at which time counsel brought another application to have the motion re-argued before another Judge and an Order for this was made by the Chief Justice. Then the original Notice of Motion was found with an endorsement dismissing the application which resulted in two further motions and the final result that an Order was taken out dismissing the application for leave over a year after counsel had first proceeded with the motion. At this stage, counsel for the Plaintiff sought to appeal as a right to the Court of Appeal, but was about a year out of time and the application to extend the time nunc pro tunc was heard by Roach J.A. who granted the application saying that the Plaintiff clearly had the intention within the time and ever since had been trying as hard as he could, albeit pursuing a wrong procedure. His Lordship was of the view that the Report was in fact a final and not an interlocutory decision (it did dispose of

all the issues in the action), and he said there was no prejudice to the defendant as it was an appeal on a record, there were certainly substantial issues at stake and these were sufficiently complicated that he should not say at that stage, there was not sufficient reasonable chance of success.

As in that case, the solicitors here spent approximately a year pursuing a wrong course of action in negotiating with the Program to see if it would change its decision when it obtained the engineer's report before they proceeded to file their appeal when they should have filed their appeal within the time limited and negotiated thereafter. However, on March 11, 1994, they finally tried to proceed the right way and, for the reasoning followed by Roach J.A., I am of the opinion that the Applicant here should be given the same relief.

On the third point, counsel for the Respondent said that he was not aware of any particular prejudice to his client and, therefore, the Applicant should not be denied her appeal for this reason. Likewise on the fourth point, while we were not concerned to any great extent with the merits of the appeal on this motion, enough was apparent to show that, if the Applicant can establish her case, she has some real complaints and she should not fail on this ground.

Accordingly, pursuant to the authority vested in it by section 10(8) of the Ministry of Consumer and Commercial Relations Act, the Tribunal orders that the time for delivery of the notice required by section 16(2) of the Ontario New Home Warranties Plan Act herein be extended nunc pro tunc to March 11, 1994 or to such date thereafter as the letters delivered by the solicitors for the Applicant to the Ontario New Home Warranty Program and to the Tribunal were, in fact, delivered.

CARLETON CONDOMINIUM CORPORATION NO. 256

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES:

RICHARD P. BOWLES, counsel
representing the Applicant

BRIAN CAMPBELL, counsel representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 22 March 1994

Ottawa

ADJOURNMENT ORDER

Upon application by counsel for the Program, with consent of counsel for the Applicant, this Tribunal orders that this matter be adjourned to a date to be fixed by the Registrar if required, pending release of the Urbanetics decision by the Tribunal. At which time, should counsel for the Applicant seek standing to appeal the Urbanetics decision, counsel for the Program is noted to have consented to such standing as required, as a basis for obtaining the consent of counsel for the Applicant to this adjournment.

DEOSARAN, RICHARD

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTY PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL:

THERESA M. WALSH, Vice-Chair, presiding
GURDIAL SINGH FIJI, Member
SAUL MERRICK, Q.C., Member

APPEARANCES:

RICHARD DEOSARAN appearing on his own behalf

STEPHEN AUSTIN, counsel, representing the
Ontario New Home Warranty Program

DATE OF

HEARING:

31 March 1994

Toronto

INTERIM ORDER

Upon the submissions of both parties at this hearing and their subsequent application for the issuance of a consent order, pursuant to section 4 of the Statutory Powers Procedure Act, R.S.O. 1990, Chapter S.22, this Tribunal hereby orders the following:

1) The Program is to pay the Applicant the total sum of three thousand three hundred and fifty dollars (\$3350.00), inclusive of taxes, within 40 days of the date of this hearing;

2) The Applicant in turn is to provide a full and final release of all present and future claims he has or may have against the Program (the "Release");

WHEREUPON THIS TRIBUNAL upon receipt of said Release will issue a final order that the proceedings in this matter are hereby disposed of without a full hearing upon the basis of the Release.

RUDY JESSWEIN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding
JACINTH HERBERT, Vice-Chair as Member
SAUL MERRICK, Q.C., Member

APPEARANCES:

RUDY JESSWEIN, appearing on his own behalf

MAY CHONG, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 23 September 1993

Toronto

CONSENT ORDER

Upon the application to the Tribunal by the Applicant Rudy Jesswein and counsel for the Registrar of the Ontario New Home Warranty Program, for issuance of a Consent Order of the Tribunal pursuant to Section 4 of the Statutory Powers Procedure Act, R.S.O. 1990, Chapter S.22 and having read the Minutes of Settlement to the disposition of the proceedings without a full hearing as evidenced by the execution thereof by the Applicant, John Ropertz, representative of the builder and witnessed by counsel for the Registrar of the Ontario New Home Warranty Program filed and attached hereto;

NOW THEREFORE THIS TRIBUNAL orders that the proceedings in this matter be and the same are hereby disposed of without a full hearing on the basis of the Minutes of Settlement and which are expressly made a part of this Consent Order.

In the matter of Rudy Jesswein and the Ontario
New Home Warranty Program:

The parties herein agree to the
following terms as minutes
of settlement:

1. Mrs. Rudy Jesswein will pay
to Mr. John Ropertz the
sum of \$2355.80
in consideration for a repair to hist.
that would involve repointing
soft and cracked areas of the
brick work on the home and
replace windowsills with
full-length sills (one piece)
and a silicone spray over
the entire brick.
2. This work would be done on
a date to be mutually determined
by the parties but no later than
one year from the date of this
agreement.
3. Half of the \$2355.80 will be
paid on the first day work
is commenced on the home
and the remainder to be paid
(other half) upon the
completion of the work.

4. Once the work is completed to the satisfaction of the homeowner, the homeowner will accept the work as full and final settlement of his claim against the Builder, the Ontario New Home Warranty Program and Mr. John Roperty of Roperty / Van Dyk Construction.

5. The work will be subject to all the usual warranties.

6. Mr. Roperty will use his best efforts to resolve any difficulties with the Building Inspector and obtain the occupancy permit for the home.

Dated at Toronto
this 23rd day
of September 1993

Rudy Jesswein
Mr. Rudy Jesswein
John Roperty
Mr. John Roperty

Witnessed by [Signature]
[Illegible text]

MICHAEL KENNEDY and
JANIS BURGESS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH ANN KILLORAN, Chair, presiding

COUNSEL: ROBERT J. BRANNAN, representing the Applicants

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF
APPLICATION: 24 January 1994

Toronto

CONSENT ORDER

Upon application to the Tribunal by counsel for the Applicants, Michael Kennedy and Janis Burgess, and counsel for the Ontario New Home Warranty Program, for issuance of a Consent Order of the Tribunal pursuant to Section 4 of the Statutory Powers Procedure Act, R.S.O. 1990, Chapter S.22 and having read the Minutes of Settlement to the disposition of the proceedings without a hearing as evidenced by the execution thereof by: the Applicants, Michael Kennedy and Janis Burgess (by her counsel Stuart J. Brannan), Penticton Excavating & Contracting Limited and Mario Ussia (the "builder"), and Stephen Austin, counsel for the Ontario New Home Warranty Program, filed and attached hereto;

NOW THEREFORE THIS TRIBUNAL orders that the proceedings in this matter are hereby disposed of without a hearing on the basis of the Minutes of Settlement which are expressly made a part of this Consent Order.

MINUTES OF SETTLEMENT

IN THE MATTER OF A HEARING BEFORE THE COMMERCIAL REFUTATION
APPEAL TRIBUNAL (C.R.A.T.) DATED JAN 24/94 BETWEEN:

JOHN BURRELL AND MICHAEL KENNEDY
(the "Appellants")

- and -

ONTARIO NEW HOME WARRANTY PROGRAM
(the "Program")

- and -

PENTITION EXCAVATING & CONTRACTING LIMITED
and MARIO OSSIA
(the "Builder")

WHEREAS:

1. The Appellants made a claim to the Program in writing dated Oct. 26/92, which claim was received by the Program on Oct. 28/92 respecting the ceramic tile complaint in their home located at 444 Bathgate Drive, Scarborough.
2. The Appellants made a further complaint in writing to Program dated August 11/93 respecting basement water leakage along the north foundation wall of the home.

3 The Program rendered a Decision to Appellants dated Aug. 19/93 in respect of the ceramic tile complaints from which the Appellants appealed by letter dated Aug. 30/93.

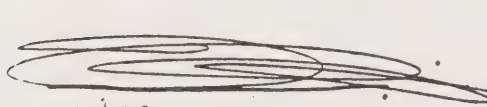
NOW THEREFORE IN CONSIDERATION OF THE AFOREMENTIONED CLAIMS BEING RESOLVED WITHOUT THE NECESSITY FOR A HEARING AND FOR OTHER GOOD AND VALUATION- (UNSIDERATION OF HEREINAFTER SET OUT ^{the receipt and satisfaction of which is hereby acknowledged by all parties,} THE PRINCIPLES HERETO AGREE AS FOLLOWS:

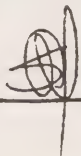
1. The Program and the Builder hereby agree to pay to the Appellants the ^{total} sum of \$14,729.00 inclusive of all taxes in full and final satisfaction of all claims heretofore referred to, inclusive of the basement water leak complaint, and ^{the Appellants agree to} forever release the Program from and the Builder from any liability therefor which presently exists or could exist in the future, save and except for any Major Structural Defect as defined by the Act that may be asserted by the Appellants in respect of such basement water leak, the onus of which ^{is} strictly upon the Appellants to prove and ~~that~~ ^{the} ~~existence~~ ^{existence} of which the Program & Builder expressly deny.

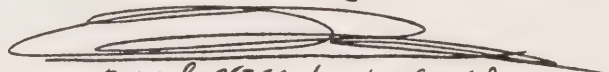
2. The foregoing amount will be paid to the Appellants by the Program within 45 days of ~~these Minutes of Settlement~~, ~~provided that~~ the Appellants executing a Full and Final Release, in the form provided by the Program.

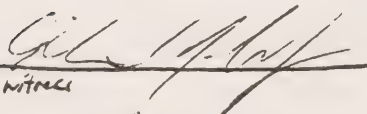
3. The Appellants agree to the Hearing before the Tribunal being disposed of by way of an Order being issued by the Court embracing these & Minutes of Settlement and will not pursue a further hearing with respect to the foregoing claims.

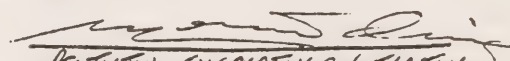
DATED this 24th day of January, 1994



 Witness
 MICHAEL Kennedy

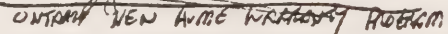

 Witness


 JAMES BURRESS by her Counsel
 STUART J. BRANNAN


 Witness


 PENTILTON EXCAVATING & CONTRACTING
 LIMITED AND MARIO OSSOLA


 Witness


 KEN AIRE

LOROB INVESTMENTS

MOTION OBJECTING TO THE ADDITION OF MORTGAGE
INSURANCE COMPANY OF CANADA AS A PARTY TO THE
PROCEEDINGS

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding

APPEARANCES:

J. CHRIS LITTLE, counsel for the Applicant
BRIAN M. CAMPBELL, counsel for the Ontario New Home
Warranty Program
SUSAN HEAKES, counsel for the Mortgage Insurance
Corporation of Canada

DATE OF

HEARING: 12 September 1994

Toronto

DATES OF

SUBMISSIONS: 19, 26 September 1994, 4 October 1994

REASONS FOR RULING

This motion was brought by the Mortgage Insurance Corporation of Canada ("MICC") objecting to its addition as a third party to the proceedings. The motion was opposed by the Ontario New Home Warranty Program (the "Program"). The Applicant which was the purchaser of the condominium unit in question took no position with respect to the motion. Oral argument was presented by counsel who were then requested by the Chair to file written submissions. Written submissions were requested in recognition of the seriousness of the issue.

MICC asked for a ruling that MICC is not a proper party to the proceedings and the Tribunal does not have authority to bind it. It offered three main arguments to support its position:

- 1) the condominium unit purchased by the Applicant is not property subject to a bond by MICC;
- 2) the Tribunal's jurisdiction is limited by legislation to a review of the decision of the Program and does not extend to the resolution of contractual issues between the Program and MICC; and
- 3) practical considerations, such as the additional expense to the parties and the potential abrogation of responsibility by the Program.

On June 5, 1990, Beachplace Development Inc., the Program and MICC entered into a Warranty Bond whereby MICC agreed to act as surety under the bond with respect to a condominium development located in Grand Bend, Ontario. Pursuant to paragraph 6(c) of the Bond, neither the developer nor the owner have any contractual rights.

The Warranty Bond states as follows:

2. The surety (MICC) shall be obligated to the Program under this bond only as follows:
 - (a) Under s. 14(1)(a) of the Act for an amount equal to the damages multiplied by the number of units in a development;
5. Where the principal named herein has failed to:
 - (a) comply with its obligation to a purchaser under the relevant purchase agreements such that the Program is obligated to the purchaser under s. 14(1)(a) of the Act, the Program may declare the bond forfeited and thereupon all amounts paid or payable by the Program to correct the principal's default, shall become due and payable by the surety on demand as a debt to the Program without further proof or need for inquiry by the surety.

It appears that this provision of the bond obliges MICC to honour the bond should it be established that there is a valid claim for damages under s.14(1)(a) of the Act.

The Applicant paid a downpayment of \$20,000 on condominium unit 506 in the development pursuant to an Agreement of Purchase and Sale. Unit 506 was in Phase I of the project, the property identified in the Warranty Bond. The Applicant alleges that by agreement dated September 21, 1990, it exchanged Unit 506 for Unit 713. This is disputed by the Program. Unit 713 is in Phase II of the project.

Phase I of the development project went into receivership and Phase II was never started. The Applicant claimed a refund of deposit and the Program denied the claim in a decision letter dated July 20, 1993.

The Ontario New Home Warranty Plan Act (the "Act") requires the Tribunal to hear appeals from applicants who are not

satisfied with decisions of the Program. The very issue to be determined by the Tribunal in this case, that is, whether or not the Applicant made a valid claim for damages pursuant to s. 14(1)(a) of the Act is the very issue that has to be substantiated by the Program to claim on the bond. Other issues between MICC and the Program may be contractual in nature with the courts alone having jurisdiction to interpret and enforce the Warranty Bond. However, the Tribunal is constituted to determine the issue of liability for damages which is one of the issues that exists between MICC and the Program.

The Applicant has no interest in this potential dispute but the Tribunal would not be expanding its legislative mandate by ordering that MICC is a proper party to these proceedings. MICC is certainly a party "affected" by a decision of the Tribunal. Ruling that MICC is a proper party does not compel it to participate in the proceedings. It could choose to participate or not. However, ruling that MICC is a party binds MICC to the decision, subject to a right of appeal.

In order for this Tribunal to determine if there has been a failure to perform on behalf of the vendor, it requires all the facts before it in opposition to or in support of the claim, including those that MICC may want to assert.

The Tribunal is able to add a party at its discretion pursuant to s. 16(4) of the Act. According to the Act, the necessary parties are the Program and the Purchaser. The section in question contemplates some party other than the necessary parties required by the Act. An additional party may be added by the Tribunal if it has an interest in the outcome. Certainly, MICC qualifies in that regard. MICC only pays the Program pursuant to its warranty bond on the basis of the vendor's failure to perform pursuant to s. 14(1)(a) of the Act, the same issue which the Tribunal must determine in the circumstances of this case.

It would be outside the Tribunal's jurisdiction to make a determination as to the application of the bond, or in respect of other arguments that MICC may raise in potential subsequent proceedings regarding the application of the bond, but it is within the Tribunal's jurisdiction to determine the issue as to damages pursuant to s. 14(1)(a) of the Act. That issue alone should not be relitigated in any subsequent proceedings, unless in the course of an appeal of the Tribunal decision to Divisional Court.

The doctrines of issue estoppel and res judicata are applied in order to avoid inconsistent results and a multiplicity of proceedings and may have application in the circumstances of this case. Issue estoppel precludes relitigation by the same parties of issues which have been finally determined in a previous

decision. The doctrine of issue estoppel has been extended to apply to proceedings before administrative tribunals.

The Tribunal holds that MICC should be added as a party because it has an interest in the subject matter of the proceeding; it may be an entity affected by the disposition of this proceeding; there exists a question of law or fact in common between the Program and MICC; and finally, MICC should be bound by the determination of this Tribunal because the Program could claim over against MICC and MICC may be liable to the Program for all or part of the Applicant's claim or MICC may be liable for an independent claim for damages.

Accordingly, pursuant to the authority vested in it by section 16(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs that MICC shall be added as a party to these proceedings.

SAVERIO AND CATERINA MIGLIANO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, Presiding
JUDITH KILLORAN, Chair as Member
EDWARD WEISZ, Member

APPEARANCES: EUGENE TRASEWICK, representing the Applicants

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 14 February 1994 Toronto

RULING RESPECTING ADJOURNMENT

Upon hearing submissions by both parties respecting a request for an adjournment by counsel for the Ontario New Home Warranty Plan to review and respond to evidence first served upon the Plan at the commencement of this hearing and the consent of the Applicants to such an adjournment, this Tribunal orders that this hearing is to be adjourned to the dates agreed to by both parties, being June 13 and 14, 1994, upon a peremptory basis as against both parties and upon condition that any new material must be served upon the other party fifteen (15) days in advance of the first hearing date, being June 13, 1994, in order to be admissible at the hearing of this matter set for June 13 and 14, 1994.

GIB PATTERSON ENTERPRISES LIMITED

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES:

NO ONE appearing for the Applicant

RICHARD CARTY, counsel representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 21 March 1994

Ottawa

ADJOURNMENT ORDER

Upon application by counsel for the Program, with the consent of Gibson Patterson on behalf of the Applicant, not in attendance, but whose consent has been stated in a letter to this Tribunal dated March 18, 1994, on the basis of likely resolution of this matter without the requirement of a hearing before this Tribunal, this Tribunal orders that this matter be adjourned to a date to be fixed by the Registrar if required.

JOANNE VARGIANTIS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
ANNE SONE, Vice-Chair as Member

APPEARANCES:
JOANNE VARGIANTIS, appearing on her own behalf

RICHARD CARTY, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 27 January 1994 Toronto

REASONS FOR RULING

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant from a decision of the Ontario New Home Warranty Program set out in a decision letter dated June 27, 1991. At the opening of the hearing, the Tribunal was advised that the Applicant had commenced two other legal proceedings in connection with claims concerning her purchase of this home, one being an action against the builder in the Ontario Court (General Division) for damages for having breached the building contract by placing the house on the wrong location on the lot and by facing the house in the wrong direction and the second being a claim in a Small Claims Court for damages for defects in the house, some, if not all of which, are the subject matter of the Applicant's claims herein.

From the information we were given concerning the action in the Ontario Court (General Division), it appeared that the cause or causes of action put forward by the plaintiff (the Applicant herein) did not include anything concerning deficiencies in the building of the home which could be in issue in this proceeding. Exhibit 7 is a copy of the Statement of Claim in that action which confirms this conclusion.

As to the Small Claims Court action, we were advised that it has been wholly discontinued. While this action did raise the same issues as those in this proceeding and clearly would have constituted a bar to our proceeding with this hearing if it had still been pending, it could not do so after being discontinued. Accordingly upon this basis, the Tribunal determined that it should proceed to hear this appeal and we commenced to hear the Applicant's evidence at some length. She put forward nine claims as to warrantable defects and went into considerable detail about them. Then, in the course of referring to a certain fact, she gave some evidence which disclosed that there is yet another legal proceeding pending concerning deficiencies in this house, namely another Small Court Claims action in Oakville brought by the Applicant as plaintiff against the Corporation of the Town of Oakville as defendant claiming that the Municipal Corporation, through its dealings with the building of this house is responsible for damages caused to the Applicant. The Town of Oakville has, in turn, brought third party proceedings against the builder Aldworth Developments Inc. for indemnity in case it is found liable for a list of items which are the very items at issue at this hearing. Clauses (a) through (f) and clause (h) of Part B of the Third Party Claim reads:

- (a) it failed to construct a sound foundation wall for the plaintiff's home when it knew or ought to have known that doing so would allow seepage and moisture penetration;
- (b) it failed to adequately patch tie holes in the foundation walls of the plaintiff's home when it knew or ought to have known that doing so would allow water seepage;
- (c) it installed defective window units without weather sealing when it knew or ought to have known that doing so would allow water seepage and water damage into the plaintiff's home;
- (d) it failed to weather seal the patio door when it knew or ought to have known that doing so would allow water seepage and cause water damage;
- (e) it failed to install a plywood underlay under the parquet flooring when it knew or ought to have known that installing the parquet flooring directly on top of a water-board subfloor would cause swelling when subjected to moisture;

- (f) it installed downspouts releasing water in areas where it knew or ought to have known that water would pool and seep;
- (h) it did not take proper measures to ensure that its servants, agents, employees or sub-contractors carried out the construction in a proper manner and in accordance with the Building Code Act, R.S.O. 1990, Chapter B.13;

(see Exhibit 8)

These are precisely some of the items which the Applicant put forward here and raise the same issues between herself and the builder in that action and third party proceeding. The Applicant indicated that she understood this Small Claims Court action and third party proceeding will come on for trial sometime in February 1994.

The law is clear that the trial of the same issues should not proceed in two different Courts or in a Court and an administrative tribunal such as this one at the same time. See the case of Robert Hale (1990) CRAT released March 9, 1990. In that case on page 6, the Tribunal concludes:

The result is that there is a possibility of contradictory decisions between a judgment of this Tribunal and that of the District Court, both with respect to the claim of Mr. Hale for damages resulting from certain deficiencies, as well as the counterclaim.

Under the circumstances, therefore, based on the facts in the present case as well as the case law, this Tribunal orders that this claim be adjourned sine die pending the decision of the action begun by Mr. Hale in the District Court of Ontario.

Reference is made in that Ruling to a number of reported decisions:

The case law on this legal point has been very consistent. In the case of Huebner v. Direct Digital Industries Ltd. et al 11 O.R. (2nd) p.372 at p.376, it was held, "It is trite law that a multiplicity of proceedings is to be avoided wherever possible."

In the case of Joseph Ciardullo rendered August 15th, 1985, this Tribunal held that it was bound by the principle of res judicata by a judgment of a superior court with respect to a claim before the tribunal.

In the case of Canada Systems Group (Est) Ltd. vs. Allendale Mutual Insurance Company (1983) 33 C.P.C. p.210, judgment as follows was rendered with respect to a motion for stay where there was a multiplicity of cases dealing with the same issues:

Held - The appeal should be dismissed. Montgomery J. was amply justified in granting the stay on the basis that there were overlapping factual issues in the case at Bar and in the other actions, that the risk of inconsistent results was to be avoided, and that a stay was in the public interest in view of the number of other complex cases involving enormous damage claims. Having regard to the likelihood of an award of prejudgment interest to the plaintiff, if successful, there was no substantial denial of justice in the delay occasioned by a stay.

In the case of Cooper vs. Cooper [1952] 2 All. E.R. 857 at p.861, Davies J. stated as follows:

...there is in many respects a co-equal jurisdiction between courts of summary jurisdiction, on the one hand, and the High Court, on the other...The principle, as I have always understood it, which applies to such cases, is that if on the same issue between the same parties there is an actual conflict of jurisdiction, or a reasonable likelihood or probability of such a conflict of jurisdiction, the inferior court, as a matter of obvious convenience and public policy, should not proceed with the hearing of the summons.

This Tribunal held in a judgment released October 28th, 1988, in the case of Mr. and Mrs. Ahmed that by the virtue of section 21 of the Statutory Powers Procedure Act, the Tribunal could adjourn a hearing. At page 2 of the judgment, it was held:

...We have taken the view that in the light of the action in the District Court, it would be premature for this Tribunal to proceed because the claim is fairly comprehensive and all the evidence is not available to us that would be available to the District Court. We take the view also that it is desirable, if not imperative, to avoid multiple proceedings thereby leading, to perhaps, inconsistent decisions by different forums.

We are of the opinion that the same risk exists in the case of Hale which is presently before us.

In the case of Mr. and Mrs. G. Wiley, in the judgment released December 11th, 1989, the Tribunal affirmed the decision of Ahmed and went on to demonstrate the inherent dangers of a lower tribunal rendering a

decision on a matter which was before a superior tribunal. The judgment stated at p.2:

However, since the Supreme Court of Ontario is not bound by any decision made on the merits by this Tribunal, conflicting and inconsistent decisions could occur if this Tribunal was to proceed and make some Order which may likely be appealed to the Divisional Court of the Supreme Court of Ontario while that Court was proceeding to deal with the two actions which could be resolved with some contrary decisions.

The Tribunal, therefore, ordered that the claim be adjourned sine die pending the decisions in the Supreme Court of Ontario.

The case of Reginald Heasman Volume 16 CRAT 289 at p.289 made a similar holding.

At this point in this hearing, the Tribunal indicated that it was of the view that this principle should be applied to this case and said that it would issue written reasons at more length thereafter for this decision. These are those reasons.

Accordingly, the Tribunal directs that the hearing be adjourned sine die pending the final disposition of the action and Third Party Claim in the Court as aforementioned.

WENTWORTH CONDOMINIUM CORPORATION NO. 127

MOTION FOR A RULING AS TO WHETHER BOB
WINTERS & ASSOCIATES LTD. MAY REPRESENT
WENTWORTH CONDOMINIUM CORPORATION NO. 127

TRIBUNAL: JUDITH A. KILLORAN, Chair

SUBMISSIONS:

Robert Winters, on behalf of Bob Winters
& Associates Ltd.
G.B. Millar, President of Wentworth Condominium
Corporation No. 127
Brian M. Campbell, representing the Ontario New
Home Warranty Program

Date of

Submissions: 2 September 1994

Toronto

REASONS FOR RULING

Wentworth Condominium Corporation No. 127 (the
"Applicant") seeks to appeal a decision of the Ontario New Home
Warranty Program (the "Program") dated October 30, 1991. In that
context, it retained Robert Winters of Bob Winters & Associates
Ltd. to act as its agent before the Commercial Registration Appeal
Tribunal. The Program objects to Mr. Winters appearing as an agent
for the following reasons:

- 1) He was recently employed by the Program;
- 2) He signed the decision letter denying the claim of the
Applicant; and
- 3) He may be required as a witness for the Program.

The Tribunal has requested that the parties file written
submissions on this issue so that it may rule on the Applicant's
motion to have Mr. Winters appear as its agent.

In response, Mr. G.B. Millar, president of Wentworth
Condominium Corporation No. 127, submits that whether Mr. Winters
is a witness or agent, the overall result would be the same. Mr.
Winters was personally involved in the destructive testing and is
required to present his observations. Mr. Millar submits that Mr.
Winters is a fair and conscientious professional, who acting as
agent, would not detract from the goal of determining the merits of
the Applicant's case.

Mr. Winters submits that he left the employment of the
Program on good terms due to the closure of the regional office.

He confirms that he wrote the decision letter denying the Applicant's claim that the brick work was not in conformance with the Ontario Building Code. However, Mr. Winters submits that he did not agree with the ruling of his superiors to deny the claim. For that reason, he states that he would be a poor witness for the Program.

Mr. Winters claims that the Applicant has two reasons for hiring his firm to represent it; namely, his familiarity with the file and his low fees. He suggests that time and money could be saved by preparing an agreed statement of facts.

Mr. Campbell, counsel for the Program, submits that as Mr. Winters was involved in the decision-making process in respect of this appeal, he is a potential witness for the Program not only regarding how the decision was made but in respect of the specifics of the decision. He was privy to the internal decision-making process and may have information which may be privileged (discussions in anticipation of legal action).

Mr. Campbell submits that there is a conflict of interest in that Mr. Winters could compromise the Program's defence by using his knowledge of the decision-making process to cross-examine witnesses.

The Tribunal concurs with the submissions made by counsel for the Program. In the circumstances of this case, Mr. Winters is in a conflict of interest position and therefore not competent to appear as an agent on behalf of this particular Applicant. He may be called as a witness by either party but for him to act as agent for the Applicant could prejudice the proceedings.

Accordingly, the Tribunal relies on its powers pursuant to section 23 of the Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, to deny the Applicant's motion to have Mr. Winters appear as its agent before the Tribunal.

WHITEHOUSE, ALLAN AND SHIRLEY

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES:

IRVING FARBER, counsel representing the
Applicants

RICHARD CARTY, counsel representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 21 March 1994

Ottawa

ADJOURNMENT ORDER

Upon the application of both parties for an adjournment of this matter to permit a third party to examine the water quality and prepare a report, towards facilitation of a resolution of this matter without the requirement of a hearing before this Tribunal, this Tribunal hereby orders that this matter be adjourned on a peremptory basis against both parties to a date to be fixed by the Registrar if required.

**MORTGAGE BROKERS ACT
REVISED STATUTES OF ONTARIO 1990, c. M.39**

IN THE MATTER of the REGISTRATION of
S. STERN FINANCIAL SERVICES LTD.
as Mortgage Broker
AND IN THE MATTER OF the PROPOSAL of the
Registrar under the Mortgage Brokers Act
made pursuant to section 7 of the Mortgage Brokers Act
TO REFUSE THE REGISTRATION
- Decision dated: 12 July 1994
AND IN THE MATTER OF a requirement for a hearing respecting
the said Proposal
- Requirement dated: 27 July 1994

S. STERN FINANCIAL SERVICES LTD.
Applicant

-and-

REGISTRAR UNDER THE MORTGAGE BROKERS ACT

CONSENT ORDER

Upon the application to the Tribunal by counsel for the Applicant, S. Stern Financial Services Ltd. and counsel for the Registrar under the Mortgage Brokers Act for issuance of a Consent Order of the Tribunal pursuant to section 4 of the Statutory Powers Procedure Act, R.S.O. 1980, c.484; and

Having reviewed the Joint Submission as to the disposition of the proceedings without a hearing set out in the Agreed Statement of Facts as evidenced by the execution thereof by the Applicant and the Registrar under the Mortgage Brokers Act filed and attached hereto;

NOW THEREFORE this Tribunal Orders that the proceedings in this matter are disposed of without a hearing on the basis of this Consent Order.

IN THE MATTER OF THE MORTGAGE BROKERS ACT,
R.S.O. 1990, c. M.39

AND IN THE MATTER OF THE APPLICATION FOR REGISTRATION
OF S. STERN FINANCIAL SERVICES LIMITED

WAIVER AND CONSENT

1. In accordance with section 4 of the Statutory Powers Procedure Act, the parties hereto hereby waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

2. S. Stern Financial Services Ltd. ("Stern Financial") was registered as a mortgage broker under the Mortgage Brokers Act (the "Act") July 22, 1988, registration expiring July 22, 1989.
3. The registration was not renewed upon expiry.
4. In February, 1993, Stern Financial contacted the office of the Registrar to arrange for the renewal of its registration. The request for renewal was initiated by Stern Financial after it learned from a potential borrower that the company was not registered under the Act.

5. On the advice of the office of the Registrar, a formal application dated June 16, 1993 was submitted by Stern Financial for the reinstatement of its registration as a mortgage broker.
6. Stern Financial had carried on business as a mortgage broker between the time its registration expired and the time it applied for the reinstatement of its registration without having been properly registered.
7. On June 27, 1994, Stern Financial was charged with having contravened section 4(1) of the Act by carrying on business as a mortgage broker while not registered.
8. On July 12, 1994, the Registrar issued a Proposal to Refuse Registration in response to the application by Stern Financial. This Proposal is the subject matter of these proceedings.
9. Stern Financial voluntarily ceased carrying on business as a mortgage broker after being served with the charge under the Act and the Proposal to Refuse Registration.
10. On November 15, 1994, Stern Financial pleaded guilty to the charge of having carried on business as a mortgage broker while not registered and was fined \$1,000.00. The fine has been paid.

11. The investigation conducted by the Ministry of Financial Institutions (the "Ministry") in this matter was precipitated by Stern Financial's own inquiries into its status after learning from a potential client that it was not properly registered.

12. The Ministry's investigation revealed that at all material times, Stern Financial operated in a very ethical manner.

13. Stern Financial had previously had an unblemished record.

JOINT SUBMISSION

14. The Registrar is of the view that the conduct of Stern Financial in operating as a mortgage broker while not properly registered under the Act warrants a sanction but not one so grave as to require the refusal of registration.

15. The following mitigating factors have been considered by the Registrar in arriving at this position:

- (a) Stern Financial voluntarily disclosed its conduct;
- (b) the Ministry's investigation into this matter was precipitated by Stern Financial's own inquiries into its status;
- (c) the Ministry's investigation does not disclose any evidence that would suggest that Stern Financial ever acted dishonestly in its dealings with the public or otherwise;

- (d) aside from the failure of Stern Financial to renew its registration in a timely fashion, it would appear that Stern Financial carried on business as a mortgage broker in a very ethical manner;
- (e) Stern Financial was very cooperative throughout the Ministry's investigation;
- (f) Stern Financial voluntarily ceased carrying on business as a mortgage broker after being charged and in effect it voluntarily served a six (6) month suspension of its mortgage brokering activity and has sustained significant financial loss as a consequence thereof; and
- (g) Stern Financial pleaded guilty to the charge of carrying on business as a mortgage broker while unregistered.

16. In light of all of these factors, the Registrar is of the view that a six (6) month delay in the reinstatement of the registration of Stern Financial, retroactive to June 27, 1994, is an appropriate sanction. Counsel for Stern Financial, Barry Rubinoff, joins in this submission.

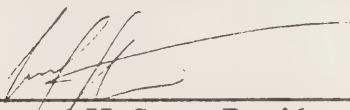
17. The parties agree that the registration of Stern Financial be reinstated effective January 2, 1995 upon payment of the annual registration fee.

18. Accordingly, the parties submit that the Tribunal direct the Registrar to vary the Proposal dated July 12, 1994 by delaying the registration of Stern Financial until January 2, 1994, a delay of approximately six (6) months, and that the registration of Stern


Financial be reinstated effective January 2, 1995 upon payment of the annual registration fee.

DATED at Toronto, this 12th day of December, 1994.

S. STERN FINANCIAL SERVICES LTD.

Per: 

Samuel H. Stern, President
I have authority to bind the Corporation



WILLIAM VASILIOU
Registrar, Mortgage Brokers Act

MERWAR BROTHERS AUTO SALES

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE THE REGISTRATION

TRIBUNAL: JUDITH ANN KILLORAN, Chair, presiding
SELWYN CHARLES, Member
DONALD STRUPAT, Member

APPEARANCES: JAMES LEWIS, Q.C., representing the Applicant

ROBERT PIERCE, Registrar under the
Motor Vehicle Dealers Act

DATE OF

HEARING: 23 March 1994

Toronto

CONSENT ORDER

Upon the application to the Tribunal by the Registrar of Motor Vehicle Dealers and Salesmen and counsel for the Applicant for issuance of a Consent Order of the Tribunal pursuant to Section 4 of the Statutory Powers Procedure Act, R.S.O. 1990, Chapter s.22 and upon hearing submissions from both parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing, subject to the following terms and conditions:

1. The registration of the Applicant shall be suspended.
2. The suspension of the Applicant shall be lifted provided that:
 - i) No later than six months from this date, counsel for the Applicant shall provide to the Registrar of Motor Vehicle Dealers and Salesmen documentation from the City of Etobicoke approving the use by the Applicant of the premises at 2044 Kipling Avenue, Rexdale, Ontario for the business of buying and selling used vehicles; and
 - ii) The results of an inspection of the premises and the books and records of the Applicant, pursuant to the provisions of the Motor Vehicle Dealers Act, satisfy the requirements of the Act.

3. The registration of the Applicant shall be revoked if sufficient evidence is provided to the Registrar that the Applicant is engaging in the business of buying and selling vehicles during the period of the suspension or if the conditions listed in No. 2 above are not met.

FRIEDHELM KEMPER

APPEAL FROM A PROPOSAL BY THE REGISTRAR UNDER
THE REAL ESTATE AND BUSINESS BROKERS ACT

TO REFUSE TO GRANT REGISTRATION

and

DAVID MORPHY

APPEAL FROM A PROPOSAL BY THE REGISTRAR UNDER
THE REAL ESTATE AND BUSINESS BROKERS ACT

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL:

THERESA M. WALSH, Vice-Chair, presiding
GURDIAL SINGH FIJI, Member
MAURICE LAMOND, Member

APPEARANCES:

PETER BURNET, counsel for both Applicants

GEORGE GLASS, counsel for the Registrar

DATE OF

HEARING: 18 October 1993

Ottawa

ADJOURNMENT AND ORDER

Upon application by Counsel for the Registrar, with the consent of Counsel for both Applicants, and after hearing submissions by both Counsel, this Tribunal hereby orders that this Hearing be adjourned upon the following conditions:

- 1) Counsel for the Registrar undertakes to instruct that judicial review be initiated of the Order of the Chairperson made on October 15, 1993, respecting this matter. Counsel for the Registrar further undertakes to use his best efforts to ensure such judicial review be initiated within thirty days (30) days of the issuance of the Chairperson's reasons in writing for the Order of October 15, 1993. Judicial review may be initiated in Toronto;

- 2) Counsel for the Registrar undertakes that the Registrar will not provide any further Notice(s) of Further Particulars without reasonable notice to Counsel for both Applicants, such reasonable notice being agreed between counsel to be at least forty-five (45) days notice; and
- 3) The next hearing before this Tribunal after said judicial review is peremptory against all parties.

FRIEDHELM KEMPER
and
DAVID MORPHY

HEARING TO CONSIDER TWO MOTIONS

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, Presiding
DAVID APPEL, Vice-Chair as Member
DENISE GIROUX, Vice-Chair as Member

APPEARANCES:
PETER BURNET, representing both Applicants

ALVIN TORBIN, representing the
Registrar under the Real Estate and Business
Brokers Act

DATES OF
HEARING: 30, 31 August, 1 September 1994 Toronto

REASONS FOR RULING

This was a hearing by the Commercial Registration Appeal Tribunal of two Motions brought by the Applicants Friedhelm Kemper and David Morphy against the respondent, the Registrar of Real Estate and Business Brokers in proceedings arising from Proposals issued by the Registrar to refuse registration of the Applicants as real estate brokers.

MOTION #1

The first Motion, notice of which is dated February 14, 1994, is

for an Order pursuant to section 13(c) of the Statutory Powers Procedure Act R.S.O. 1990 c.S.22, that the Tribunal state a case to the Divisional Court pursuant to the said Section as to whether the serving by the Registrar of Real Estate and Business Brokers of the Notices of Further Particulars dated October 25, 1993 upon the Applicants would, if the Tribunal were a Court of law, have been contempt of that Court.

MOTION #2

The second motion, notice of which is dated August 12, 1994 is

for an Order, pursuant to section 23(1) of the Statutory Powers Procedure Act that the Proposals of the Registrar of Real Estate and Business Brokers pursuant to section 9(1) of The Real Estate and Business Brokers Act to refuse to grant the registration of Friedhelm Kemper and David Morphy be refused on the basis that the Respondent Registrar's conduct in the said proceedings to date has resulted in a complete denial of Natural Justice to the said Friedhelm Kemper and David Morphy, and that, as a consequence of the said Registrar's conduct, the said Friedhelm Kemper and David Morphy cannot obtain a Hearing in accordance with the Rules of Natural Justice.

AND FURTHER TAKE NOTICE that the Applicants will seek an Order that the conduct in these proceedings by the Respondent Registrar has resulted in a denial of the Applicants's right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principals of fundamental justice as provided by Section 7 of the Canadian Charter of Rights and Freedoms.

Relevant Facts and History

The facts and the history of these matters relevant to these motions are somewhat complicated. Both Applicants have been registered as real estate brokers since 1975. Both were brokers, officers and shareholders with Century 21 Kemper Realty Inc. until 1990, when that company encountered financial difficulties and ceased operations. In September 1990, it voluntarily surrendered its registration as a real estate broker. The personal registration of both Applicants was transferred to another company which was registered as a real estate broker, Century 21 McGowan Real Estate Ltd. The office of the Registrar conducted an investigation into the affairs of Century 21 Kemper Realty Inc., and of both of the Applicants and on April 15, 1991, wrote both Applicants asking them to sign and return to the Registrar a form which would constitute a voluntary surrender of their registrations as real estate brokers and an application to continue registration as real estate salespersons, upon terms and conditions that they would not apply for registration again as brokers for two years,

neither would be a partner, or associate in any way with another broker or company licensed as such for five years, neither would operate as a sole proprietor real estate broker for five years and that they would agree to surrender their registrations as real estate salesperson or as brokers, if in the opinion of the Registrar, they should breach any of these terms or any of the terms of Ont.Reg.891/80 as amended. Both Applicants refused to sign such a document and stated that the Registrar did not have grounds to require the same.

Both Applicant's existing registrations as real estate brokers expired on September 7, 1991. On August 20, 1991, both submitted applications for the required biennial renewal of their registrations but both of these applications were defective. In Mr. Kemper's case, he failed to answer two of the required questions and, in Mr. Morphy's, he failed to sign his application. Also his cheque was dishonoured by the bank. The Registrar's office advised both Applicants of these irregularities and advised that they would have to resubmit applications properly completed which they did on September 10, 1991 by which time their registrations had expired. On October 8, 1991, the Registrar's office advised of this, told them it would treat the applications as applications for new registrations and unless and until these were allowed, they must cease all activities as brokers.

It appears that on January 29, 1991, the Registrar issued and delivered to both Applicants Notices of Proposal to Refuse these Registrations. We have a copy of the Notice so issued to Mr. Morphy at tab 3 of Motion Record #2, but we do not have a copy of the Notice of Proposal then delivered to Mr. Kemper. Both Applicants through their then solicitor, Mr. Zimmer, served notice that they required a hearing before this Tribunal arising out of these Proposals. Both of the Applicants had listed on their applications, as sponsoring broker, Century 21 McGowan Real Estate Limited. That company terminated its registration on February 21, 1992 and the Registrar questioned the jurisdiction of this Tribunal to hold the hearings upon these Proposals in these circumstances.

A preliminary hearing was arranged before the Tribunal, held by then Vice-Chair Leslie on June 5, 1992 to deal with the question of jurisdiction. Counsel for the Registrar took the position that the Tribunal only has jurisdiction when there is a valid application before the Registrar and this was not the case when there was no sponsoring broker. Counsel for the Applicants took the position that the original applications had been filed on time and the deficiencies in them were only technical deficiencies which had been cured. He said that these men had been carrying on business for upwards of 20 years and their registration and right to carry on until a hearing was held pursuant to the Act should not be denied on such grounds. At this hearing, Mr. Zimmer further

complained that, having taken the position that the Applicants' registration had expired in September of 1991, the Registrar took until January 29, 1992 to get the Proposal out and then had said that the hearing could not take place until at least November 1992 because he wished to be present and would not be available until that time. Mr. Zimmer argued that it was patently unfair for the Applicants to be out of business in these circumstances for such a long time. He said that, if they could not get on with the matter in a better fashion, he had instructions to seek an order of mandamus from the Court.

Counsel for the Registrar said these were not technical difficulties and that the registration of both Applicants as brokers had lapsed under the Act for not being renewed on time. He said that the dishonoured cheque was not replaced until December 1991 and there was information about a number of judgements against the Applicants to be obtained so that it took time to make the necessary investigations and prepare proper Proposals. During the course of the argument, it appears to have been agreed that the Applicants should be allowed to get a new sponsoring broker and that they must do so before the hearing could proceed. Mr. Zimmer then said that they had a new sponsoring broker ready and that he would consider the problems being discussed solved, if they could get on with a hearing within four weeks. A discussion of prospective dates to proceed then ensued with objections from counsel for the Registrar to the earlier dates proposed which led to a suggestion from the Applicants' counsel that he allow their registration to continue on an interim basis until the hearing is held and judgment given which would remove the urgency on the Applicants' part. The Registrar's counsel advised that the Registrar rejected that suggestion out of hand.

In the result, the Tribunal made an order that the Applicants be given to June 12 to file new applications, that the Registrar be given to June 19 to issue new Proposals based upon them and that the rest of the issues be determined at the hearing which should take place as soon as possible in August or September 1992.

The redated Notice of Proposal of June 30, 1992, regarding Mr. Kemper refers to the fact that the new application was not received until June 15, 1992 and was not complete in that question 3 was not answered fully. The Registrar requested a more complete answer and received this on June 18, 1992. In his Proposal, the Registrar stated that he would refuse the registration for the same reasons as he had set out in the earlier one. On July 15, 1992, Mr. Zimmer wrote to the Tribunal and to the Registrar requesting a hearing before the Tribunal in respect to the new Proposals.

On October 8, 1992, the office of the Tribunal sent out Notices of Hearings to be held at the Tribunal's premises in Toronto of Mr. Kemper's matter on January 4 and 5 and Mr. Morphy's matter on January 6 and 7, 1993. On October 9, 1992, the Applicant brought a Motion returnable on October 14, 1992 before the Tribunal for:

- a) An order declaring that the Respondent, the Registrar of the Real Estate and Business Brokers Act is in breach of the order of the Vice Chairman granted June 5, 1992.
- b) An order declaring that the Respondent, has abandoned its Proposals issued against the Applicants dated the 29th day of January, 1992 and the 30th day of June 1992.
- c) An order declaring the Applicants to be registered pursuant to the provisions of the Real Estate and Business Brokers Act R.S.O. 1990 Chapter R.4 as of the 12th day of June, 1992 and directing the Respondent to forthwith issue a certificate to that effect.

The grounds for the Motion were stated to be:

- a) By order of June 5, 1992, the Vice-Chair of the Commercial Registration Appeal Tribunal ordered that the hearing of the Applicants' appeal be heard at the first available day in the months of either August or September, 1992 and that the Respondent issue fresh proposals to refuse to grant registration to the Applicants no later than June 19, 1992.
- b) The Respondent purported to issue such fresh proposals to refuse to grant the registration of the Applicants on June 30, 1992.
- c) Notwithstanding the efforts of the Applicants, the Respondent, Registrar of the Real Estate and Business Brokers Act and the Tribunal itself took no steps to ensure that the appeals of the Applicants were heard as ordered by the Vice Chairman of the Tribunal.
- d) On October 8, 1992, the Commercial Registration Appeal Tribunal purported to issue an appointment for a notice of

hearing of the appeals of each of the Applicants and to establish a date for hearing of such hearings, in the case of Friedhelm Kemper on January 4, 1993 and in the case of David Morphy on January 6, 1993 in contravention for the terms of the order of the Vice Chair of the Tribunal.

- e) By reason of the failures of the Respondent, the Registrar of Real Estate and Business Brokers Act, as aforesaid and the right of the Applicants to rely on the procedure established by the Tribunal, these proceedings are in contravention of the principle that administrative and quasi-judicial proceedings should be carried on under fundamental rules of fairness and in contravention of the provisions of Sections 7 and 11 of Part I of the Constitution Act, 1982.
- f) By reason of the unconscionable delay, the Applicants had been denied a hearing in accordance with a procedure which is in accordance with the fundamental principles of fairness and the proceedings herein are contrary to the provisions of Section 11 of Part I of the Constitution Act, 1992 which require a hearing within a reasonable time and in accordance with the principals of the fundamental justice.
- g) The provisions of the Real Estate and Business Brokers Act, R.S.O. 1990 operate with the effect of permitting the Respondent, the Registrar of the Real Estate and Business Brokers Act to revoke or to deny the registration of the Applicants without due process and are thereby in contravention of fundamental principles of administrative law and in contravention of the provisions of Section 7 of Part I of the Constitution Act, 1982.

This motion was heard on October 14, 1992 by Vice-Chair Stephenson. Mr. Glass, appearing for the Registrar, began with a statement of some facts explaining the delay in carrying out the Order of June 5. He referred first to the fact that at the hearing on June 5, counsel for the Registrar had asked specifically that the new applications be delivered directly to the Registrar's office and offered a specific address. Counsel for the Applicants had thought this not necessary and, in fact, they were delivered to the regular mail room and this resulted in three days delay. Then

a deficiency was found in one of the applications and a fax was sent to Mr. Zimmer to get this corrected so that these applications were not in place until the time ordered on June 5 for the issue of the new Proposals by the Registrar. Some further delay was encountered in getting the new Proposals signed and, in fact, they went out on June 30 instead of June 19 as ordered. Mr. Glass said that at no time in July or August did the Applicants complain of any of this delay or take any steps then to get the hearing on. He pointed out that this motion was served after the Tribunal had sent out the notices for the hearing to be held in the first week of the following January. Mr. Zimmer responded to that saying that he had contacted the former counsel for the Registrar who had appeared at the June 5 hearing throughout the summer and asked about getting the hearing on.

In response to a question by the Chair, Mr. Zimmer said that nothing then turned upon these enumerated delays. Mr. Glass then submitted that once the Tribunal had issued its order of June 5, it was its, the Tribunal's responsibility to put the case on and not that of his clients and that, therefore, the Motion was brought in the wrong place and the Tribunal had no jurisdiction to hear it.

Counsel for the Applicant, in his submission, in support of his Motion complained very strongly of the delay in the face of the Order which had been made and said it supported the relief he was seeking. Mr. Glass responded to this saying that he and the Registrar were available to proceed in August and September, but had heard nothing about any dates and the first he heard was from the Tribunal's office enquiring about the January 1993 dates to which he had agreed immediately.

Mr. Glass then argued vehemently that the Registrar was not taking a technical position at all, but had a strong objection to the registration of these Applicants on the merits and that what should be done was the hearing on the merits be held as soon as possible. Mr. Zimmer said that what Mr. Glass had just said "flies in the face of what's been going on since the summer of 1991".

The Vice-Chair gave a judgment that same day and a formal Order was issued incorporating this on October 23. In the first place, he found by reason of the way in which the dates of June 2 and June 19 set out in the Order of June 5 were extended and the consents involved, the Registrar was not in breach of that portion of the Order of Vice-Chair Leslie. He then went on to find a joint responsibility upon all parties to establish appropriate dates for the hearings and that that responsibility had not been accepted by all parties and, therefore, he did not find an absolute obligation on either the Registrar or counsel for the Applicants to establish a hearing date in August or September. He found that there was no

evidence that the Registrar had abandoned his Proposal and by reason of this and the fact that the parties had a joint responsibility to expedite the hearing, he dismissed the Motion. On the other hand, because the livelihood of the Applicants was at stake, he said that matters of this nature should be given the highest priority for bringing them on.

At the conclusion of the hearing, after a discussion among the Chair and both counsel, Mr. Zimmer asked Mr. Glass if, at the hearing, the Registrar would be relying on any further particulars other than what had been furnished in the Notices delivered up to that date. He received an unequivocal reply that all of the particulars upon which the Registrar would be relying were set out in the Proposals and that if there were any further particulars to be introduced, he would give an additional notice and provide disclosure and that he would do this as soon as the information became available. In the result, the dates fixed for the hearing to commence on January 4, 1993, were allowed to stand and no earlier dates were fixed.

On December 30, 1992, with only one business day remaining before the hearing, counsel for the Registrar delivered to the Applicants' counsel a letter enclosing copies of documents in respect of disclosure at the hearing. We were told that these papers constituted a bundle at least 1 1/2" thick. On the same day, December 30, Mr. Glass telephoned Mr. Zimmer and told him that, upon the information the Registrar had, it appeared that Mr. Zimmer had a conflict of interest in acting for both Kemper and Morphy as he, Mr. Glass, said that one of them was trying to escape liability under the Act by placing the blame for some of the wrongdoing alleged by the Registrar upon the other. Mr. Glass took the position that he did not want to go ahead with the hearing and, after a considerable time spent, find it aborted for this reason. Mr. Zimmer was not able to get instructions to deal with this matter on such short notice and, at the opening of the hearing, on January 4, 1993 at the Tribunal's offices in Toronto, Mr. Zimmer asked for an adjournment which was granted then to 9:30 the next morning, January 5, 1993, to enable him to get instructions.

It was clear to the Tribunal at that time that the problem was substantially caused by the fact that Mr. Glass delivered his letter and material at 4:00 p.m. on December 30 and first raised the question of conflict of interest at that time and made a forceful argument that Mr. Zimmer should retire from the case. It was made clear during the argument of these Motions that the information contained in the 1 1/2" thickness of documents and in the telephone call had been in the possession of the Registrar and his counsel for sometime prior to December 30 and could have been furnished with considerably more notice.

The case did not proceed on January 5 and Mr. Zimmer withdrew as solicitor for the Applicants and Mr. Burnet was retained by them. On January 8, 1993, a new date was fixed for the hearing, March 1, 1993 and notices for the same were sent out by the Tribunal's office.

In the meantime, Mr. Burnet launched a Motion for Judicial Review before the Ontario Court (General Division) against the Registrar and the Tribunal seeking that the Applicants be now registered as real estate brokers and that the Tribunal be prohibited from proceeding further with the matter. On February 24, 1993, Mr. Burnet brought a Motion before Douglas Rutherford J. for interim relief under Section 4 of the Judicial Review Procedures Act seeking an Order for the immediate registration of the Applicants. Judgement was given upon this Motion on March 9, 1993 ordering the immediate registration of the Applicants as brokers as interim relief and leaving all of the other issues in the Application for Judicial Review to the Court dealing with the main application.

On January 21, 1993, Mr. Burnet had filed in the Ontario Court (General Division) proceedings two Affidavits, one each from Mr. Kemper and Mr. Morphy in support of his Motions. In his Affidavit, Mr. Kemper sets out the salient facts of the history of the proceedings to that point, states that his personal knowledge of the proceedings came mostly from Mr. Morphy who had dealt with their former solicitor Mr. Zimmer on behalf of both of them. He adopts the facts thereof as set out in Mr. Morphy's Affidavit of the same date and states that because of the refusal of the Registrar to allow him to trade, his income has fallen from an annual average of \$100,000 to zero. In his Affidavit, Mr. Morphy begins by setting out the salient facts of the history of the proceedings including the hearings before Mr. Leslie and Mr. Stephenson and the adjournment on January 4, 1993. He then goes on to say that he believed that the Registrar was delaying unnecessarily the hearing of his Proposal and that the Tribunal was allowing the Registrar to do this by granting successive adjournments to accommodate the personal schedule of the Registrar and the convenience of his counsel despite his, Mr. Morphy's, loss of livelihood and income. He concluded with the same statement as did Mr. Kemper, that his annual income has fallen from \$100,000 average to zero.

It appears that the proceedings before the Ontario Court (General Division) in which Mr. Burnet obtained the interim relief from Rutherford J. have not proceeded farther.

On February 10, 1993, the Registrar delivered to Mr. Kemper a Notice of Further or Other Particulars. These concerned the issue of bankruptcy proceedings against Mr. Kemper. The

Registrar stated that he had learned about February 1, 1993 that a Petition for a Receiving Order (the fact appears to be misstated in the Notice where it is stated that he had been petitioned into bankruptcy) was served upon the Applicant on May 7, 1991 and that the Applicant was disputing this and the Bankruptcy Court had not yet heard the matter. He further stated that in his application of September 11, 1991, the Applicant answered the question "Are you now, or have you ever been involved in personal bankruptcy proceedings?" with the answer "No". Again in the application filed on June 15, 1992 and completed June 18, 1992, he answered the same question "No" and goes on to state, that the Applicant was involved in bankruptcy proceedings as of the date of each of these applications and failed to disclose that fact.

On the same date, the Registrar issued a Notice of Further or Other Particulars to Mr. Morphy and these Particulars are the same as those alleged against Mr. Kemper. Likewise, there is a statement that the Applicant was petitioned into bankruptcy on May 7, 1991, but also that the Petition was disputed and the issue not yet heard so that the correct situation appears to be that on May 7, 1991, a Petition for a receiving Order was served, it was disputed and not yet heard. There is the same allegation of failure to answer the question honestly on the application.

On February 25, 1993, Mr. Burnet wrote to the Tribunal requesting an adjournment of the hearing scheduled for March 1. In his letter, he stated that he was only retained in the matter in mid-January and that his clients were served with the Notices of Further or Other Particulars dated February 10 on February 17 and that he and his clients had been completely focused on the Motion for Judicial Review heard by Rutherford J. aforementioned since he had been retained. He said he hoped an adjournment could be arranged without his having to come to Toronto from Ottawa on March 1.

The Assistant Registrar of the Tribunal sent a copy of Mr. Burnet's letter to Mr. Glass and the latter wrote to her on February 26, 1993, saying he was taking no position with regard to the request for an adjournment and that the Registrar had his witnesses lined up and is ready to proceed on March 1. He went on to say that Mr. Burnet had previously been complaining of adjournments obtained by the Registrar and he wanted it clear that this one was being sought on behalf of the Applicants. He went on to say that there was nothing in the information in the Notices of February 10 that was not fully known to the Applicants.

Because of the position taken by Mr. Glass, it was necessary for both counsel to appear before the Tribunal in Toronto on March 1, 1993 to deal with the application for adjournment. Because of Mr. Burnet's submissions that he had not had enough time

to prepare, the Tribunal granted his application and made an order adjourning the case to be heard in Ottawa at the earliest convenient date which could be arranged. It is interesting to note that while Mr. Burnet was appearing for both Messrs. Kemper and Morphy as Mr. Zimmer had been doing before, Mr. Glass did not raise the issue of conflict of interest at all, although he had strenuously argued this when the case had come for hearing the time before.

The next thing which happened chronologically was that on March 9, 1993, Rutherford J. issued his Judgement to which we have referred above. This materially altered the situation as between the parties as to any question of prejudice from further delay as the Applicants were again registered as real estate brokers. They can now carry on business and the Registrar is now seeking to revoke an existing registration.

The Tribunal then fixed two weeks in Ottawa for the hearing commencing October 18, 1993.

On September 29, 1993, the Registrar issued another pair of Notices of Further or Other Particulars, one each to Mr. Kemper and to Mr. Morphy. The Further Particulars alleged against Mr. Kemper were that on August 16, 1993, the Bankruptcy Court had made a Receiving Order against him and appointed Ernst and Young Inc. of Ottawa as Trustee of his bankrupt estate and that no appeal had been taken from that Order. The Further Particulars alleged against Mr. Morphy contain identical allegations concerning a Receiving Order on the same date August 16, 1993, but goes on with additional allegations that, in answer to questions from the Registrar, Mr. Morphy had advised that judgments against him by four named judgment creditors had been satisfied but that, when the Registrar checked with the solicitors for these judgment creditors in question, he was informed that these judgments had not been satisfied and remained outstanding. The Registrar put this forward as additional evidence of dishonesty on the part of Mr. Morphy.

Mr. Burnet complained strongly about the service of these last mentioned Notices of Further or Other Particulars. The Registrar sent copies directly to Mr. Kemper and to Mr. Morphy and did not send them to him, although the Registrar well knew he was acting and would be preparing for the hearing. Furthermore, while the notice to Mr. Kemper was sent to his proper address and he received it and gave a copy to Mr. Burnet, the notice to Mr. Morphy was sent to an old address and he did not receive it. Mr. Burnet assumed when he got the copy of the notice from Mr. Kemper that there was probably a similar one for Mr. Morphy but, of course, the latter contained the additional allegations about the judgements and he had no indication of them until just before the hearing. On September 27, 1993, Mr. Glass sent a letter to Mr. Burnet with a

quantity of documents. On October 14, 1993, Mr. Burnet wrote to him stating that he would be objecting to the introduction of this material at the hearing on the basis that it constituted new allegations and was not consistent with the Proposal and the existing Notices of Further or Other Particulars. Mr. Burnet said that, if Mr. Glass did not agree to this, he, Mr. Burnet would seek an adjournment to have sufficient time to answer these allegations. At the end of his letter, he noted that this was the third time he had presented new arguments, allegations or particulars just before a hearing was scheduled to begin.

Mr. Glass replied by letter the same day to Mr. Burnet. He said that in each case, the information in question had come to the attention of the Registrar shortly before the Notices of Further or Other Particulars were delivered and it would not have been possible to give notice earlier than he did. He also said it was only an extension of the matters earlier raised concerning the bankruptcy proceedings and the Judgements and the failure of the Applicants to give correct information. He said the Registrar had a number of witnesses coming long distances and that he was ready to proceed. He said if Mr. Burnet had some other legitimate reason for an adjournment, he would consider it but if he was relying only on the basis set out in his letter of the same day, he, Mr. Glass, would oppose the application. He ended by saying:

I submit it is significant that when the position was that your clients were not registered, they were the ones who were urging that the matter before the Tribunal proceed, but now that the court has directed that they be registered, they are the ones seeking adjournments.

Mr. Burnet replied to Mr. Glass on October 15, 1993 as follows:

I acknowledge your letter of October 14, 1993, to which I reply as follows:

a) You say "the latest Notice of Further or Other Particulars deals with the Receiving Order...of August 16, 1993." What Notice? The last Notice we have received from you is dated February 10, 1993 and deals with the Application filed in July, 1992.

b) the unstated, implied accusations in the material you sent September 27, 1993 deal with the issue of concealing the

particulars of judgements from the Registrar. This issue has not been raised by you before. Our client firmly denies the allegations, but must collect evidence of very complicated settlement discussions to answer the allegations before the Tribunal.

c) I repeat, this is the third time you have raised new issues or provided complicated materials shortly before the Hearing is scheduled. The first time you provided disclosure several inches thick one working day before the Hearing. The Notice of Further or Other Particulars was delivered a week or two before the scheduled date in March even though the news was nine months old and the matters referred to therein were initiated by the two gentlemen who have been actively assisting you since 1990.

d) You are seeking to deprive my clients of their professional livelihood. They are entitled to know the charges they have to meet and to have adequate time to prepare their case. As long as you keep making new allegations at the last minute, I will continue to seek adjournments if required. I assume you are familiar with the rules of natural justice.

e) The imputations in your last paragraph are uncalled for. I can only assume that, as you believe our requests for an adjournment are for the purpose of delay because our clients are now registered, your several requests for adjournments when they were not registered were for a similar purpose. (By the way, the issue of whether they were registered or not is still before the Divisional Court). My clients are ready to proceed if you will withdraw your most recent fresh allegations and materials. It is not our side that continually changes the nature of the case just before the Hearing.

In order to minimize the inconvenience to the Tribunal and your witnesses, I am

prepared to argue the adjournment by conference call to-day on one hours notice, however I must leave the office by 4:15 p.m.

Mr. Burnet sent a copy of this letter to the Tribunal.

As a result of this exchange of correspondence, arrangements were made for the two counsel to argue a Motion on short notice, by telephone conference call and the Motion was heard by the Chair of the Tribunal. All parties appear to have agreed to this proceeding in order to avoid everyone having to be ready to start with a two-week hearing in Ottawa which might not proceed. The Judgment given by the Tribunal on this motion is of such consequence to the issues before us now that it is quoted in full. A formal Judgment was issued on November 3, but the operative parts of the Order were given during the conference call and conveyed to both counsel at its conclusion on October 15. The formal Order is as follows:

This motion for adjournment was brought before the Tribunal by the Applicants on short notice. The Applicants argued that their counsel had not been served with the Registrar's Notices of Further or Other Particulars dated September 29, 1993 (the "Notices") until the day of the motion which was heard by consent on Friday, October 15, 1993. The motion was heard on the same day it was requested to minimize the inconvenience to the Tribunal and witnesses scheduled for a hearing in Ottawa on Monday, October 18, 1993.

The Registrar opposed the motion for adjournment and refused to withdraw the Notices although the Applicants requested that either:

- 1) the hearing be adjourned to allow sufficient time to prepare the Applicants' defence to the further allegations set out in the Notices; or
- 2) the hearing proceed on Monday, October 18, 1993 on condition that the Notices and the supporting documents be withdrawn by the Registrar.

Preliminary Issues

The Tribunal obtained the consent of the parties to the following:

- 1) single person adjudication; and
- 2) that the motion would not be heard in a hearing room but rather, submissions of counsel for the Registrar would be made in person and submissions by counsel for the Applicants would be made by speaker phone from his office in Ottawa.

Decision

An oral decision was given to both counsel via teleconference on the same day. The parties were informed that written reasons were to follow.

The decision of the Tribunal was:

"After hearing the submissions from counsel for all parties and reading the materials submitted:

- 1) The Tribunal denies the motion for adjournment; and
- 2) The Tribunal orders the Registrar's Notices of Further or Other Particulars dated September 29, 1993 withdrawn."

History of Proceedings

These proceedings have been ongoing since September of 1991. Each Applicant has been the subject of two proposals dated January 29, 1992 and June 30, 1992 to refuse their registrations as brokers under the Real Estate and Business Brokers Act, R.S.O. 1990, c.R.4 (the "REBBA"). On June 11, 1992, the Tribunal ordered the Registrar to withdraw the proposals dated January 29, 1992 and issue fresh proposals no later than June 19, 1992. The Tribunal also ordered that the matter be heard at the first available date.

The fresh proposals were dated June 30, 1992, but the matter was not heard. The Applicants alleged that one working day

before a hearing set for January of 1993, they received disclosure from the Registrar which raised new issues. As well, they were served with Notices of Further or Other Particulars dated February 10, 1993 shortly before a March 1, 1993 hearing date. On April 1, 1993, the parties agreed to new hearing dates. The dates agreed to were: October 18 to October 29, 1993.

There have been motions, adjournments, a preliminary hearing and a judicial review related to this matter. However, there has yet to be a hearing on the substantive issues. It is in this context that the motion for a further adjournment was heard.

Service of the Notices

The Applicants argued that service of the Notices was flawed for the following reasons:

- 1) Counsel was not served until the day this motion was heard; and
- 2) The Registrar attempted unsuccessfully to serve the Applicant, David Morphy, at an address which had been changed with the Registrar's Office some months before.

The Registrar attributed the above irregularities in service to "administrative error" but argued that delivery to Applicants' counsel of the supporting documents with a letter dated September 27, 1993 was sufficient notice of the new allegations.

A review of the list of supporting documents in question revealed that they were letters dated from April 26, 1993 to August 4, 1993. Not only was the delayed delivery of these letters regrettable, thereby allowing less time for preparation, but certainly delivery of the letters did not constitute service of the Notices. The Tribunal finds that service

of the Notices was flawed and was not perfected until Applicants' counsel was served on Friday, October 15, 1993.

Content of the Notices

The allegations in the Notices, particularly with respect to the Notice relating to Applicant Morphy, were not merely an extension of the allegations in the Proposals, as argued by the Registrar. Four instances of deliberately misleading the Registrar were listed in the Notice relating to Applicant Morphy. Not only were the Applicants faced with the prospect of preparing a defence to these fresh allegations with negligible notice but in addition, for the first time, one of the Applicants faced allegations which differed from those of the other Applicant. The joinder of the Applicants much earlier in the proceedings was based on the almost identical nature of the cases which they had to meet.

Conclusions

The Tribunal is very concerned with the long history of these proceedings. It is important that this appeal be heard and a decision rendered as soon as possible from both the perspective of consumer protection and fairness to the Applicants. It is apparent on the face of the Notices that new and substantive allegations are raised with respect to the good character of Applicant Morphy.

The Applicants are entitled to sufficient notice of new allegations as required by section 9 (1) of the REBBA and section 8 of the Statutory Powers Procedure Act, R.S.O. 1990, c. S. 22 (the "SPPA"). Section 9(1) of the REBBA states:

Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

The Proposals themselves notify the Applicants that Part 1 of the SPPA and provisions of Part II of that Act apply to any hearings held by this Tribunal. Section 8 of the SPPA is quoted in the Proposals as follows:

8. Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

The Tribunal finds that the Registrar did not satisfy notice requirements set out in Section 9 (1) of the REBBA and section 8 of the SPPA.

There is an appearance of a lack of "fairness" when a proposal is based on certain particulars and further investigation results in additional allegations being served on an applicant shortly before the date set for hearing. The seriousness of the new allegations should be weighed with the lateness of their introduction. The rules of natural justice require that applicants are entitled to know the case which they have to meet and to have adequate time to prepare.

Such problems might reasonably be resolved to the mutual benefit of the parties through adjournment. The principles of "fairness" are undermined, however, when during the course of a proceeding it appears that a pattern of such conduct is being established which protracts the proceeding and effectively denies the Applicants the opportunity to meet the case against them.

In this proceeding, it appears that this is the third occasion when the Registrar has served new allegations or raised new issues shortly before a hearing. The Notice which alleged impropriety and put

in issue the good character of the Applicant Morphy was not served on either Mr. Morphy or his counsel until Friday, October 15, 1993, yet the Registrar did not consent to the request for an adjournment or withdraw the Notices.

The decision of the Tribunal is made in light of the long history of these proceedings while taking into consideration that section 23(1) of the SPPA states:

A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

The Tribunal denies the motion for adjournment and orders the Registrar's Notices of Further or Other Particulars dated September 29, 1993 withdrawn.

Accordingly, a three member panel of the Tribunal opened the hearing in Ottawa on Monday morning October 18 with both Messrs. Burnet and Glass present. Mr. Glass addressed the Tribunal first and recited the facts of the Order made by the Chair of the Tribunal the previous Friday. He submitted that she did not have jurisdiction to make such an Order. He said she should either have granted the adjournment sought or not granted it and, if not, allowed the case to proceed upon all the relevant evidence. He said he had instructions to bring an Application for Judicial Review to set the Order of October 15 aside by way of certiorari and he requested an adjournment of the hearing to allow him to bring this application. Mr. Burnet told the Tribunal that he consented to this application for an adjournment on purely pragmatic grounds. He said that it appeared that the hearing would take over two weeks and, given what his clients had already been through with trouble and expense, he just could not take the risk of their having to go through this twice which might be the case if the hearing proceeded now and was heard in full - except for the material ordered excluded or withdrawn - and if, later the Divisional Court reversed the Order of the Tribunal made on October 15 and ordered the matter reheard on that basis. He said he felt he was forced to consent.

Mr. Burnet went on to ask that Mr. Glass be requested to begin his Judicial Review application within 30 days because he thought it very unfair if he were granted this adjournment, then did not bring the Judicial Review application and then argued that

he, Mr. Burnet had plenty of time to review the new material so he should then be able to use it. Mr. Burnet said that this would "just be an end run around the Order that Madam Chair made on Friday".

Mr. Glass gave an undertaking to use his best efforts to get the proceedings for Judicial Review underway within 30 days. The Vice-Chair of the Tribunal, presiding at the hearing, expressed concern with the long history of these matters and the long history of adjournments. She asked Mr. Glass if he could assure the Tribunal that the Crown Law Office would, when so requested by him, proceed with the Application for Judicial Review and stated to him that, if he were not able to undertake a judicial review this adjournment would not be granted. The Vice-Chair further stated, that if the adjournment is granted it is on the basis the judicial review will be taken of the particular issue which was the jurisdiction to quash the Notice of Further or Other Particulars. Mr. Glass again responded that he had instructions to proceed on that basis. The Vice-Chair then indicated that the Tribunal was prepared to grant the adjournment on consent, but this was done conditional upon counsel for the Registrar initiating within 30 days the Application for Judicial Review. It is clear from these passages in the transcript that everyone knew that this adjournment was granted on the condition that an application would proceed for Judicial Review and that the Registrar and his counsel would do everything they could to get it underway within 30 days.

There followed some discussion of the importance that these parties come to a hearing in the matter and that a decision be rendered as soon as possible. In this context, the following passage is found in the transcript beginning at the bottom of page 27 and this transcript is the first document in the bound book entitled Record of the CRAT, beginning bottom of p.27:

Mr. Burnet: That is fine Madam Chairperson. I just wonder whether, in the light of that position, my friend can indicate whether or not his investigation is complete and whether or not he is prepared to undertake that, with the exception of the Notice of Further Particulars that will be the subject matter of the judicial review, that there will be no further allegations.

THE CHAIRMAN: Mr. Glass, that seems to me a fair question.

MR. GLASS: Well, it is a fair question, but I don't think I can give that

undertaking. I don't know what my clients are going to do --

Mr. Burnet: This has been going on for a year and a half, Madam Chairperson. At some point, a client is entitled to know the charges against him, to have proper time to prepare.

This is the third time we got into this and, really, I take the implied slap on the wrist to both sides, Madam Chairperson, but I think the slap should be a little lighter over here. If my friend can't even undertake that his investigation is complete, then how can I not object to saying it is going to be brought on peremptorily, because three times he has brought things at the last minute.

MR. GLASS: As my friend is well aware -- I won't go into the details, but the events -- or at least one of the events that led to the Notice of Further Particulars occurred only recently, within the last month or two - less than two months, about six weeks.

I mean, it is impossible for me to say whether there will be further events that occur.

THE CHAIRMAN: Mr. Glass, I am sure that you cannot predict the future, and there in fact may be further events that will occur that the Registrar is of the opinion are material and relevant events.

But I agree with counsel that at some point a conclusion to the investigation must take place. Counsel is entitled to know fully the case that is to be met and this matter is to come on for a Hearing.

MR. GLASS: Well --

THE CHAIRMAN: There has been a history of long delays and adjournments. The

jurisdiction of this Tribunal has been engaged by the Applicant's right to appeal and this Tribunal is prepared to proceed to a Hearing and render a decision.

I agree that counsel must be allowed the opportunity to know the case to be met, and that is the conclusion of the investigation.

MR. GLASS: In terms of what one might call an active investigation, I think I can give you an undertaking in that respect. But in terms of something that may occur that may be extremely important to the Tribunal's decision, no one can predict that. It is just not possible.

THE CHAIRMAN: At some point, these parties must be prepared to draw the line, put a period at the end of the sentence, and have a Hearing on the material that you have. Are you prepared to do that upon the judicial review application?

Mr. Glass asked for a moment to confer upon this and after some further discussion and being given a short recess, he responded at the bottom of p.31.

MR. GLASS: Madam Chair, what I can undertake to you is that the Registrar would not provide any further Notice of Further Particulars without reasonable notice to my friend, and that he concedes -- and I am prepared to agree -- that reasonable notice would be 45 days.

THE CHAIRMAN: Mr. Burnet?

MR. BURNET: That is acceptable.

THE CHAIRMAN: Thank you for resolving that issue.

One would have hoped that the special difficulties and problems with this case had been resolved and were over at this point. Unfortunately, this was not to be the case.

On October 25, 1993, the Registrar delivered new Notices of Further or Other Particulars to both Mr. Kemper and Mr. Morphy

in identical form and terms as those dated September 29 which he had been ordered to withdraw. This brought a predictable letter from Mr. Burnet which is dated November 4, 1993 and reads as follows:

We are in receipt of the Notices of Further or Other Particulars dated October 25th, 1993 that you sent to our clients. Once again, the Notice that you sent to Mr. Morphy was incorrect and does not correspond to the official change of address he sent you last summer.

These Notices are identical to the Notices you attempted to serve on us on October 15th, 1993 and which were ordered withdrawn by the Chairperson of the Commercial Registration Appeal Tribunal on the same date. In our view, your serving of these Notices constitutes a clear violation of the undertaking you provided to the Tribunal on October 18th, 1993 and are a rather blatant attempt to circumvent the Chairpersons' order that was made against the Registrar.

On October 18th, 1993, you undertook to the Tribunal and to us that you would commence a judicial review application within 30 days of the Chairperson's written decision in order to test the validity of her order. As you have simply re-served the offending material, clearly the judicial review application will be moot and, indeed, we wonder whether your application will even be heard by the Court as a consequence. You will recall that I expressly raised the fear that you would proceed in this manner to circumvent the Chairperson's order and Ms. Walsh, the panel Chairperson, insisted on your undertakings in consequence. In our view, your re-serving the Notices of Further Particulars constitutes an abuse of process, a violation of your undertakings to the Tribunal and an improper attempt to obtain the adjournment on terms that the Tribunal was clearly not prepared to allow you.

Let me recap the events which led to the adjournment:

a) On October 13, 1993, I wrote to you objecting to the Notice of Further or Other Particulars (the main one of which had not been served at that time) and asked you to either withdraw the Notices or consent to an adjournment. You refused to do either.

b) On Friday, October 15, 1993, I brought a motion for an adjournment. The Chairperson refused this motion but ordered you to withdraw the Notices, which was satisfactory to my clients who were then prepared to proceed on October 18th, 1993 as scheduled.

c) On October 18th, 1993, you sought an adjournment in order to contest the Chairperson's ruling of October 15th. After two hours of discussion, and in the face of an obviously reluctant Tribunal, you undertook to have this matter resolved through judicial review.

At the conclusion of argument, the Tribunal advised that, when the judicial review application was complete, this matter would be brought on peremptorily against both parties. I agreed, but raised the question of whether you would be prepared to give an undertaking that your case was complete and that no further Notices would be sent, as such could prejudice my clients if no further adjournments were to be permitted. The Tribunal shared my concern and sought your undertaking that you would be serving no further notices. I believe the record will show that you stated something like: "With respect to matters that have occurred to date I can give this undertaking, but I am concerned about matters which might occur in the future." It was on this basis, that we agreed that any further notices would be served within 45 days of the hearing, but this clearly related to any incidents or events which

arose after October 18, 1993. For you to take a contrary position makes, in our respectful opinion, a mockery of the undertakings you provided, as there is nothing left for the Divisional Court to decide by way of judicial review. As I stated earlier, the Courts are notoriously reluctant to decide hypothetical questions, and I seriously doubt that your judicial review will be heard.

Please be advised that, if you take the position that the Notices of October 25th, 1993 were validly served on our clients, we take the position that there has been a serious abuse of the Tribunal's process and a blatant violation of your undertakings to the Tribunal. Accordingly, our clients reserve all rights in respect thereto.

Kindly advise us of your position as soon as possible, so that we may bring this matter before the Tribunal at the earliest possible date.

(Motion Record #1
Ex.D Affidavit Kemper/Morphy)

Mr. Glass responded to this letter by a letter to Mr. Burnet of November 16, 1993 in which he wrote:

I thought our telephone discussion had resolved your letter of November 4, 1993.

In any event I disagree with all of the comments contained in your letter except as expressly adopted in this letter.

It was clear that you, on behalf of your clients, sought an adjournment of the Hearing on the grounds that the Notice of Further or Other Particulars was served on you too late.

In my submission, the Chairman had the option of either granting you the adjournment or not. She did not have the option of striking out the Notice of

Further or Other particulars, nor did you seek that remedy.

I undertook to bring Judicial Review to review her order directing the Registrar to withdraw his Notice of Further or Other Particulars and I am presently drafting the materials to proceed with that application.

In the meantime the Registrar has served you and your clients with a Notice of Further or Other Particulars. The Hearing has been adjourned sine die pending the Application for Judicial Review. You have ample time to review the new Notice of Further or Other Particulars and deal with it as may seem appropriate.

You did not raise a concern at the Tribunal that you would be served with a new Notice of Further or Other Particulars months ahead of the hearing. You expressed a concern that you would again be served with a new Notice or additional materials without adequate notice. You also raised a concern that I would be able to argue at the Judicial Review that you now had an adequate opportunity to respond to the Notice of Further or Other Particulars purportedly ordered withdrawn.

There is no abuse of process here. On the contrary you are obtaining exactly what you sought in the first place.

(Motion Record #1
Ex.E Affidavit Kemper/Morphy)

The Tribunal finds on a reading of this letter that Mr. Glass was knowingly and deliberately doing exactly what Mr. Burnet was accusing him of doing when he called it a blatant attempt to circumvent the Chairperson's Order and further that the action taken in serving these last Notices of Further Particulars constituted an abuse of process, a violation of his undertaking to the Tribunal and an improper attempt to obtain the adjournment on terms that the Tribunal was clearly not prepared to allow.

The next document which we have is an Affidavit sworn on December 3, 1993 by the Registrar before Mr. Glass as a

Commissioner in some proceeding in the Ontario Court (General Division). It is not clear on the information we have how this Affidavit was originally intended to be used, but it was filed with us by counsel for the Registrar at the opening of the Respondent's submissions to us and we have examined it for its assistance on the Motions before us. It is essentially a recital of the rather lengthy history of the whole matter. We find particularly significant the sworn statement of the Registrar himself in paragraph 43 thereof:

43. On or about October 25, 1993, the Registrar issued new Notices of Further or Other Particulars which were essentially identically (sic) to the ones which had been directed to be withdrawn by the Chair of the Tribunal. Attached hereto and marked Exhibit "Q" are true copies of the said Notices of Further or Other Particulars.

On February 4, 1994, Mr. Burnet sent Mr. Glass a letter enclosing a copy of the Notice of Motion which is the first Motion before us and of the Affidavit of his clients in support thereof. It is to be noted that the letter is dated February 4 and the Notice of Motion February 14, but nothing appears to turn on this peculiarity. In any event, the Motion was originally returnable March 29 and finally came on with the second Motion before us at this hearing. Also enclosed was the Affidavit aforementioned. In this Affidavit in paragraph 4, the Applicants state that they consented to the adjournment of the hearing in Ottawa on October 18, 1993 because "although we were ready to proceed on October 18, 1993, there was no way we could bear the expense of having to repeat a hearing that would last several weeks if the Registrar's Application for Judicial Review was successful.

Paragraph 7 of that Affidavit reads as follows

7. We are advised by our solicitor, and do verily believe, that the serving of a Notice of Further Particulars of October 25, 1993 would, if this Tribunal were a court, constitute a contempt of that court, as the whole issue to the Chairperson's decision of October 15, 1993, related to the validity of the Notices served that day. In simply reserving the material which the Chairperson had ordered withdrawn, the Registrar circumvented the Chairperson's Order, made the Judicial Review Application moot and,

in essence, allowed the Registrar the benefit of the adjournment of October 18, 1993 on terms the Tribunal was not prepared to allow him. We also allege that the serving of the Notice of Further or Other Particulars by the Registrar was in direct violation of undertakings given by counsel for the Registrar before the Tribunal in Ottawa on October 18, 1993.

(Motion Record #1, tab 2)

In the meantime, the Application for Judicial Review was launched on behalf of the Registrar, naming as Respondents thereto not only the Applicants herein, but also this Tribunal. In the circumstances, the Tribunal retained counsel to respond to the Motion, Ms. Margo Blight of Messrs. Genest, Murray, DesBrisay & Lamek. As a result of what had occurred, Ms. Blight brought an application in January or February 1994 to have the Registrar's Application for Judicial Review dismissed on grounds that it was brought prematurely. We do not have a copy of this Notice of Motion, but the wording found in other documentation we have indicates that this was the case. Neither do we have a copy of any material filed on this motion. We refer to this as part of the ongoing history and to help with an understanding of some of the ensuing correspondence.

On February 23, 1994, Mr. Glass wrote a letter to both Ms. Blight and Mr. Burnet in which he refers to a fax from Ms. Blight of February 22 and of which we do not have a copy. It appears from his letter that Ms. Blight had raised the issue of prematurity of his Judicial Review application and he responds to this by stating that, as a condition of getting the adjournment he sought on October 18, 1993, he had been required to give and had given his undertaking to bring the Judicial Review application within 30 days. He then goes on to refer to Mr. Burnet's Motion to have the Tribunal state a case to the Divisional Court for contempt under section 13 of the Statutory Powers Procedure Act for the purpose of finding his client, the Registrar of Real Estate and Business Brokers in contempt. He then goes on to say:

By instructing you to take the action that you have described on the grounds that you have described, the Tribunal as a corporate body has irrevocably and irretrievably biased itself in deciding such an application objectively since it has clearly already decided the issue. In the circumstances, would you please confirm that the Tribunal will decline to

entertain Mr. Burnet's application on behalf of his clients.

In the event that your client is unwilling to decline to hear Mr. Burnet's application, then I will be obliged to seek instructions to bring a motion to the Divisional Court for an Order prohibiting the Tribunal from hearing such an application on the grounds of bias.

said: In his letter of the same date to Mr. Burnet, Mr. Glass

I enclose herewith a copy of a letter that I recently received from Margo Blight, counsel for the Commercial Registration Appeal Tribunal indicating the action she has received instructions to take.

In the circumstances it is obvious that the Commercial Registration Appeal Tribunal has irrevocably and irretrievably biased itself respecting your clients' application under section 13 of the Statutory Powers and Procedures Act, since it has clearly made up its mind in the matter. It cannot possibly objectively decide your application. Would you kindly advise me as soon as possible whether or not you intend to withdraw your application in the circumstances. If you are unwilling to withdraw your application, in the circumstances I would have no alternative but to seek instructions to bring a motion to the Divisional Court for an Order prohibiting the Tribunal from hearing your application on the grounds of bias.

For obvious reasons I would seek your immediate reply as to your clients' position in the matter.

(Motion Record #2, tab 11)

By letter of March 1, 1994, Ms. Blight responded to the statements of Mr. Glass concerning the issues of prematurity of the Motion for Judicial Review and of bias on the part of the Tribunal to hear the Motion brought to state the case for contempt:

I disagree with the suggestion made in your letter, that by granting your request for a consent adjournment of its hearing, the Tribunal has in any way limited its ability to argue the question of prematurity.

I have received a copy of Mr. Burnet's most recent motion to the Tribunal. Contrary to the suggestion in your letter, the Tribunal has not decided any issues under s.13 of the Statutory Powers Procedure Act. Mr. Burnet's motion is properly before the Tribunal, and the Tribunal will hear and decide the issues presented in a fair and unbiased manner. If you are concerned with the Tribunal's ability to decide Mr. Burnet's motion objectively, that concern ought to be expressed to the panel assigned to the motion.

(Motion Record 2, tab 11)

On March 1, 1994, Mr. Glass sent a letter to Mr. Burnet in the following terms:

**RE: Kemper and Morphy v. Registrar,
R.E.B.B.A.**

Please find enclosed volumes I, II and III and Index of our Document Brief for the above mentioned CRAT hearing.

Enclosed with this were the four volumes to which reference is made therein which when placed one on top of another reach a height of 3". Apart from the reference at the top of the letter, there is nothing to indicate in which of the pending proceedings in this whole matter these documents were intended to be used. A perusal of these documents indicate that they appear probably to contain all of the documents upon which the Registrar originally relied in support of his Proposals and the Notices of Further or Other Particulars served prior to the ones in dispute on October 15, 1993, that they certainly do contain all of the documents which were ordered to be withdrawn by the Order of October 15 and that moreover they contain some documents dealing with some new allegations never before raised. At the same time, Mr. Glass sent a copy of these three document briefs and the index to the Tribunal. Mr. Burnet complained strongly during the course of the argument that it was completely improper for him to have

done this in the circumstances and that his clients would be seriously prejudiced by this if the Tribunal members in preparation for hearing the case on the merits reviewed this material and then it was later found or held that parts of it were not properly admissible as evidence.

On March 7, 1994, Mr. Glass wrote to both Mr. Burnet and Ms. Blight as follows:

RE: Registrar of R.E.B.B.A. vs
Kemper/Morphy and C.R.A.T.

We have now received your letters and Ms. Blight's Motion returnable on May 2, 1994.

There are currently three Judicial Proceedings pending and the Registrar is considering a fourth. It is apparent that this matter is taking on a life of its own which has nothing to do with the issue of the entitlement to registration of Messrs. Kemper and Morphy under the Real Estate and Business Brokers Act.

With a view to save time and money to all concerned, and to proceed expeditiously to the vital issue - namely, the registration of Messrs. Kemper and Morphy under the Real Estate and Business Brokers Act ("REBBA"), the Registrar, REBBA, on a without prejudice basis, will withdraw his Notice of Further or Other Particulars dated September 29, 1993 (which Notice was the subject of the Chair's ruling dated October 15, 1993) and his Notice of Further or Other Particulars dated October 25, 1993 (all without conceding that the Tribunal has the power to direct the Registrar to withdraw a Notice of Further or Other Particulars) PROVIDED THAT:

1. Mr. Morphy agrees that the allegations in the Notice of Further or Other Particulars served on Mr. Kemper in September, 1993 will also apply to him. [In this regard, Mr. Burnet has agreed that the September, 1993 Notice was properly served on Mr. Kemper];
2. That the Commercial Registration Appeal

Tribunal ("The Tribunal") releases me from my undertaking to proceed with the Judicial Review Application in respect of the Decision of the Chair dated October 15, 1993; and

3. All parties discontinue the three outstanding legal proceedings pending (i.e. the Registrar's Judicial Review Application; the Tribunal's Motion to Quash the Registrar's Judicial Review Application; and the Application for a stated case) without costs.

We can then proceed with the hearing before the Tribunal to determine whether the Registrar's Proposal should be upheld or not.

I would appreciate your early reply.

(Motion Record #2, tab 11)

It is to be noted that, in view of the serving of the Notices of Further or Other Particulars on October 25, 1993 and of the four volumes of documents enclosed with the letter of March 1, 1994, Mr. Glass was attempting by these negotiations to get every advantage for his case which he had been seeking all along, including some items with which strong objection had been taken and some of which had been ordered withdrawn and also to escape from all of the proceedings then pending in the Divisional Court at the same time.

Not surprisingly this offer was not accepted. On March 14, 1994, Mr. Burnet responded to Mr. Glass as follows:

Thank you for your letter of March 7, 1994. In considering this response, we have not discussed the matter with Ms. Blight, as we are not sure if such would be appropriate.

It is our position that the Registrar's conduct in both the investigation of this matter and the prosecution of his case has become a major issue in the proceedings. This issue will be an important part of our clients' case and we are not prepared to simply "undo" that which has been done and that which has put our clients to

great time and expense. Accordingly, we decline to withdraw our motion under section 13 of The Statutory Power Procedures Act, which we understand is scheduled to be heard June 30, 1994. The other matters in your proposal seem to be between Ms. Blight and yourself.

We might have ended matters there, however at the same time we were considering your letter of March 7, we reviewed the documents you served on us about March 1st. As these documents came six months after the hearing was scheduled, we assumed when they arrived that they were nothing more than a bound, collated version of the documents you have already provided to us. However, in reviewing the 150 documents, we have discovered that many of them are being provided to us for the first time. More to the point, it is also clear that many relate to potential allegations that have nothing whatsoever to do with the Notices of Particulars you have served to date, whether properly or improperly. Because there are no allegations, we cannot be certain what you are trying to allege. However, the documents pertain to the following completely new issues, among others:

- a) An Agreement of Purchase and Sale for 24 County Road, Plantaganent in 1990;
- b) The results of an inspection by the Registrar's officials of Century 21 Goldleaf Realty Inc. in February, 1993;
- c) One of our client's original salesman's application in 1972;
- d) Our clients' driving records!!

Furthermore, there are many documents relating to the allegations against Mr. Morphy contained in the Notice of Further or Other Particulars ordered withdrawn by the Tribunal last October.

We are dumbfounded, to put it bluntly, that, with all the litigation surrounding this matter, you would take the opportunity to introduce completely new allegations with or without proper notices. We take the position that this is contrary to your undertaking to the Tribunal given last October and constitutes yet another abuse of process and possible contempt of the Tribunal's proceedings. Frankly, we no longer have any confidence in the Registrar's commitment to adhere to the law with respect to notice and disclosure. Please be advised that neither we nor our clients, who have invested hundreds of hours and thousands of dollars in defending allegations that keep changing more than two years after the proceedings began, will be making any efforts to respond to whatever it is you may be alleging in these documents.

Mr. Glass, enough is enough. For a great many reasons that would take too long to recount here, we take the position that our clients have suffered a complete denial of natural justice, that the Registrar's actions have compromised the Tribunal's integrity and our clients' rights under section 7 of the Charter of Rights have been violated. Accordingly, within about two weeks, we shall be bringing a motion before the Tribunal to have the Registrar's Proposal refused as being an abuse of process and a violation of our clients' civil rights. We will be happy to have this motion heard together with our pending motion on June 30, however I should advise that I expect my argument to be at least a day in length and possibly more.

By copy of this letter to Ms. Blight, I advise the Tribunal of these intentions and our upcoming motion. I would ask her to reply to me (with a copy to you) with any instructions from the Tribunal respecting the scheduling of the motion. Frankly, I am no longer comfortable in

contacting the Tribunal directly on this matter.

(Motion Record #2, tab 11)

On March 17, 1994, Ms. Blight wrote to both Mr. Glass and Mr. Burnet stating the Tribunal's position with regard to both Mr. Glass's letter of March 7 and Mr. Burnet's letter of March 15 (should be 14):

I have Mr. Glass' letter dated March 7, 1994, to Mr. Burnet and myself, and Mr. Burnet's response to Mr. Glass dated March 15, 1994. This letter responds to both those letters.

The Tribunal's position is that any agreements or disagreements which may have arisen or which may arise in the future between your respective clients must be dealt with by a panel of the Tribunal constituted to hear the case. This includes any motions either party wishes to present to the Tribunal. There is no reason why the parties should not deal directly with the Registrar of the Tribunal on matters of scheduling.

The Tribunal does not wish to be part of any negotiations between your respective clients as to the conduct of the hearing. As far as the Tribunal is concerned, all orders made by the Tribunal remain in effect until varied by a properly constituted panel of the Tribunal or the court. This includes the Tribunal's ruling of October 15, 1993 which dealt with Mr. Burnet's contested motion for an adjournment.

On October 18, 1993, Mr. Glass made a motion to adjourn the Tribunal's hearing on the merits, in order that he might bring an application for judicial review of the Tribunal's ruling of October 15, 1993. The Tribunal granted Mr. Glass' motion on condition that Mr. Glass undertake to initiate his application within 30 days of the issuance of written

reasons for the October 15 ruling, and make best efforts to expedite that application. The Tribunal sought the undertaking in order to ensure that any delays in its own process were kept to a minimum. There is nothing in Mr. Glass' undertaking which requires him to proceed with the application for judicial review or which prevents him from withdrawing his application at any time.

On March 18, 1994, Mr. Glass wrote to Mr. Burnet in response to his letter of March 14 and said:

It is apparent that you have little interest in proceeding expeditiously with the C.R.A.T. hearing and wish to unduly delay the proceedings. Obviously, delaying the proceedings works to your clients' benefit. You indicated that the service of the disclosure brief on you on March 1, 1994 was contrary to the undertaking that was given to the Tribunal. It is trite to say that none of the documents in the brief are exhibits until they have been accepted as such by the Tribunal.

The undertakings I gave to the Tribunal consisted, firstly, of an undertaking to use my best efforts to promptly commence an Application for Judicial Review to quash the Order of the Chair of the Tribunal dated October 15, 1993 directing the withdrawal of the Notice of Further or Other Particulars addressed to David Morphy dated September 29, 1993 and; secondly, that no additional material would be provided to you without adequate notice, namely, at least forty five days prior to the hearing before the Tribunal. It is highly unlikely that the hearing before the Tribunal will commence before April 15, 1994 and, therefore, you will have received more than the notice which was undertaken to the Tribunal.

A disclosure brief necessarily contains all of the documents that relate generally

to the issues that have been raised by the original proposal and subsequent Notice of Further or Other Particulars served over a year ago.

It is apparent that all you are attempting to do is delay the Tribunal Hearing. Accordingly, if you choose to bring an application as set out in your letter, please be advised that the Registrar will seek solicitor and client costs against both you and your clients in that connection.

Ms. Blight's letter of March 17, 1994 sets out the Tribunal's position that my undertaking does not require me to proceed with the Application for Judicial Review, nor prevent me from withdrawing the application at any time. I have now been instructed to advise the Tribunal and your clients that the Registrar, without conceding the right of the Chair of the Tribunal to make the Order she made on October 15, 1993, hereby withdraws the Notice of Further or Other Particulars addressed to David Morphy dated September 29, 1993 and the Notices of Further or Other Particulars addressed to Messrs. Kemper and Morphy dated October 25 1993. I remind you that you conceded on October 15, 1993, that the September 29, 1993 Notice of Further or Other Particulars sent to Friedhelm Kemper had been properly served.

It appears that the motion brought by Ms. Blight to quash the Application for Judicial Review brought by Mr. Glass was coming on on May 2, 1994 and on April 27, 1994, Mr. Glass sent to Ms. Blight a Notice of Discontinuance respecting the Registrar's Application for Judicial Review which brought to an end the Registrar's challenge of the Order made by the Chair of the Tribunal on October 15, 1993. There remained a dispute as to the costs payable upon these Motions in the Divisional Court which is discussed in the correspondence among the solicitors for the three parties to these proceedings. We shall not refer further to this as it does not appear relevant to any issue with which we have to deal on the Motions before us.

The next documentation we have is the Notice of Motion for the second Motion before us dated August 12, 1994 and the Affidavit of both Applicants of the same date filed in support of it. In this Affidavit, the Applicants state that to date, they have spent over \$25,000 in legal fees in all of these proceedings, that the prolongation of the proceedings by the Registrar repeatedly raising new allegations has caused them considerable embarrassment and important disadvantages in the Ottawa community in their business capacity. They state that they believe the main reason they have been put to enormous time, expense and public embarrassment through these protracted proceedings is simply because they refused to agree with the Registrar's proposed terms for a voluntary registration in the Spring of 1991.

Submissions on behalf of the Applicants

On the first Motion, Mr. Burnet began his submissions by stating that he wished to make it clear that he was attacking the Registrar in the corporate sense and not making a personal attack upon him. He said that in his actions, the Registrar has shown disregard for both the letter and the spirit of the Orders of the Tribunal and has repeatedly brought forward new allegations against the Applicants just before the commencement of hearings contrary to the Orders of the Tribunal and his own undertakings in that regard. Furthermore, he said the Registrar has directly accused the Tribunal of bias. Part of this last accusation is based upon his actions in responding to a Motion which he had served upon it. He submitted that all of the foregoing constituted a contempt of the Tribunal and that his subsequent withdrawal of the offending material did not constitute a purging of this contempt because, before he did so, he had already put the same material back before the Tribunal in the same form.

On the second motion, Mr. Burnet began by acknowledging that he was seeking an extraordinary remedy in asking the Tribunal to direct the Registrar to withdraw his Proposals or not to carry them out, the whole without a hearing on the merits. He submitted that the conduct of the Registrar had created a situation in which justice could be rendered to his clients in no other way. He said he could no longer rely upon Orders that certain documentation be withdrawn and reference not be made to it at a hearing because this remedy had been tried and had failed. He said he could no longer rely upon the undertakings given by the Registrar because they also had been tried and had failed. He said that there had been inordinate and unconscionable delay which has caused irremediable prejudice to the Applicants. He submitted that s.23(1) of the Statutory Powers Procedure Act provided the Tribunal with the jurisdiction to make such an order.

He also submitted that the actions of the Registrar have created a situation that must create an impression of bias on the

part of the Tribunal in the mind of a disinterested outside observer. In this regard, he stressed that he was not suggesting that anyone on the Tribunal was biased but, he said, this was not the test - rather the test is the appearance to a disinterested outsider. He submitted that no panel of the Tribunal could now deal with the Registrar's Proposals on their merits whether it consisted of members already familiar with some parts of these proceedings or with fresh members with no prior involvement with them, without the Applicants being at disadvantage. He submitted that there was such an abuse of process here as to amount to a denial of natural justice and so as to taint these proceedings that the Applicants could not be perceived to be treated justly by the Tribunal in any way other than by its making the Order he is seeking on the second Motion. He submitted that any other result on this Motion will raise with the public outside a reasonable apprehension of bias on the part of the Tribunal. He said that the Registrar herein took unfair advantage of the informalities in the way in which the Tribunal operates.

In support of the second ground of relief sought in his second Notice of Motion, Mr. Burnet submitted that the actions of the Registrar were such as to deprive the Applicants of rights guaranteed to them by section 7 of the Canadian Charter of Rights and Freedom.

Mr. Burnet concluded by submitting that, unless the only remedy available to meet this is applied now, namely to stop these whole proceedings, the sheer power of the state is such that it will crush anyone it goes after in this way and deny all justice to the observation of an outside observer.

Submissions on Behalf of the Respondent

Mr. Torbin began by addressing Motion #2 and submitted that the Applicants have no basis in either law or fact for the relief which they are seeking. He dealt first with the second basis for the relief sought, the argument pursuant to section 7 of the Canadian Charter of Rights and Freedom. He referred the Tribunal to a number of judicial authorities to the effect that section 7 of the Charter did not guarantee the sort of right claimed by the Applicants here. The Tribunal agreed with this submission and we shall deal in a little more detail with these cases cited when we outline our decision hereunder upon the issues before us.

Mr. Torbin then went on to attack the first basis set out in the second Notice of Motion. He submitted that the powers and jurisdiction of the Tribunal are set out in section 9 of the Real Estate and Business Brokers Act and specifically under subsection (4) thereof requires that, where an applicant requests a hearing arising out of a Proposal, the Tribunal must appoint a time and

hold a hearing and only after doing this can it make an order dealing with the Proposal. He said that this conclusion is reenforced by the provisions of section 7(2) of the Ministry of Consumer and Commercial Relations Act which mandates the Tribunal to hold hearings and perform duties assigned to it by or under any Acts or regulation. He said that the authority given a Tribunal under section 23(1) of the Statutory Powers Procedure Act is limited to the context in which it is found and does not extend to giving jurisdiction to the Tribunal in dealing with the matter referred to it by statute in a manner beyond or outside the jurisdiction conferred by that statute, in this case, the Real Estate and Business Brokers Act.

He then went on to discuss the various grounds for the relief sought in the Notice of Motion. As to the allegations of delay, he said it has not been undue. He said we must start with the Notices of Proposals with which the hearing now contemplated will be concerned which were issued on June 30, 1992 and not some previous date and since that time, while there have been delays, they have not all been caused by one side and in all the circumstances have not been undue.

As to the complaint of the Registrar's continuing to raise new allegations, he said it was the duty of the Registrar, when such matters came to his attention to put them forward. He said the real cause of delay on January 4, 1993, was the problem of a conflict of interest between the two Applicants and not the new allegations. He said there was no delay to be criticized on October 18 attributable to this cause and that overall, there was no prejudice caused to the Applicants in any legally recognized sense. Once the Order of Rutherford J. was issued, the prejudice to the Applicants for not being able to work as brokers was removed.

In addressing the complaint that the Applicants had been denied natural justice and have a reasonable apprehension that they cannot have an independent and impartial hearing because the Registrar has shown disregard for the Tribunal and its orders, he submitted that there was no denial of natural justice in any of this. In basing this complaint upon the refusal of the Registrar to abide by his undertaking to the Tribunal, Mr. Torbin submitted that a proper reading of the transcript of the hearing on October 18 and particularly the passage at p.29 thereof, shows that the Registrar undertook not to continue his investigation and issue more particulars based on past occurrences, but reserved the right to raise new matters which might arise in the future which it would be not only his right, but his duty to do. He said there was nothing here to support the Applicants' argument that they could not get an independent and impartial hearing.

In basing this complaint upon the argument that the Registrar, through his counsel, has alleged that the Tribunal has irrevocably and irretrievably biased itself, Mr. Torbin submitted that this only referred to the hearing of the interlocutory proceedings toward which it was directed and in no way had any reference to a hearing on the merits with which we should now be concerned. Mr. Torbin stressed emphatically that in these Motions in no way was the Registrar alleging any bias on the part of the Tribunal. The Tribunal wishes to comment at this point that it accepts this last submission from Mr. Torbin without any reservation.

In basing the complaint upon the argument that the Registrar's actions have created an adversarial relationship with the Tribunal and led the Applicants to have reasonable apprehension they cannot get an impartial hearing, Mr. Torbin said this is nothing but sophistry. The Tribunal comments here that it is indeed a peculiar argument that actions on the part of one party to a dispute which would tend to make the adjudicator of the dispute displeased with it would have the result of giving to the other party grounds to complain it could not get a fair or impartial hearing.

Referring to the three volumes of documents and their indices delivered on March 1, 1994, Mr. Torbin argued that, to the extent that they were copies of documents already properly before the Tribunal there was nothing improper in what Mr. Glass did. With regard to the others, he could have quite properly not disclosed them until a hearing and used them on cross-examination. He was only required to disclose them if he intended to rely upon them as part of his case in chief. Therefore, there were benefits to the Applicants, as well as to the Registrar in what he did and it certainly could not be argued that this action created such prejudice to the Applicants as to justify the relief sought.

Finally, Mr. Torbin submitted that in all the present circumstances of the matter, there would be much more prejudice and unfairness to the Registrar in ordering the Applicants to keep their registrations without a hearing upon the merits than to the Applicants in proceeding with such a hearing.

Coming to his argument on the first motion, Mr. Torbin began by submitting that the Tribunal is confined to the precise wording of the relief sought in the Notice of Motion and, therefore, the only case it can state is as to whether the serving of the Notices of Further Particulars would have constituted a contempt of a Court. He then submitted that any such contempt, if there was one, was purged by the withdrawal of the offending Notices. He submitted that this being so, there was nothing of substance here to warrant the stating of a case of contempt and,

alternatively, even if there was a technical contempt in the serving of these Notices when it was purged nothing remained of sufficient consequence to warrant such a formal action regarding it. He conceded that the purging of a contempt does not wipe it out and only goes to a reduced punishment for it but submitted that, in the circumstances of this matter, at worst, the end result for the Registrar is that there should be no penalty or so slight a one that these proceedings should not be further encumbered with such a stated case to the Divisional Court, but the compelling thing to be done to be fair to all parties is to hold a hearing on the merits as soon as possible.

Reply on Behalf of the Applicants

In reply, Mr. Burnet submitted that Mr. Torbin had put his case on rigid and narrow technicalities and statutory interpretations and that the Tribunal should look more broadly upon what was really going on.

He said that with the exception of the admission that the disclosure made in the Notices served on December 29, 1992, was not on time, Mr. Torbin did not admit that anything else done by the Registrar was wrong. He submitted that process consistently ignored becomes substantive in nature and not merely procedural.

Mr. Burnet then submitted that section 9(4) of the Real Estate and Business Brokers Act was enacted to protect Applicants and ensure that they have a right to a hearing, but does not limit the jurisdiction of the Tribunal to direct the Registrar to refrain from carrying out a Proposal without a hearing if the circumstances so warrant, as he said they do in these circumstances. He further submitted that there was no way open to the Tribunal to apply properly its mandate under section 23(1) of the Statutory Powers Procedure Act herein otherwise than to grant the relief sought.

In replying to the argument on the first Motion, Mr. Burnet said that in considering the question of whether there are grounds for stating a case for a finding of contempt and considering to what extent such contempt has been purged, all of the conduct of the Registrar and his counsel regarding the Order of the Tribunal and the documentation which it found to be inadmissible as well as all of the attacks upon the Tribunal are relevant and should be taken into account.

At the very close of the argument, there were a few additional points made by counsel which were not really part of the formal reply by Mr. Burnet to which we wish to make reference. Referring to the allegation put forward by Mr. Glass, a conflict of interest between Kemper and Morphy which led to the adjournment of the hearing scheduled to commence on January 4, 1993, Mr. Burnet

said he never had any idea where Mr. Glass got the idea that Kemper was trying to exculpate himself by blaming Morphy. On this the Tribunal notes that no reference was brought to our attention to any evidence to this effect and we have already commented that Mr. Glass having got that adjournment never referred to it again although both Applicants continue to be represented by the same counsel.

During a further discussion of what had been withdrawn by Mr. Glass and what had not, Mr. Burnet said that Mr. Glass never withdrew the Notice of September 29, 1993 against Mr. Kemper. Mr. Torbin responded that if this had not already been done, he thereby withdrew it on behalf of the Registrar. He told the Tribunal that the Registrar is abiding by and intends fully to abide by the Order of the Chair of the Tribunal dated October 15, 1993.

During the course of the argument, counsel for both parties cited a number of cases to us. We shall refer to some of them in our decision.

Decision of the Tribunal

We shall deal first with what has been termed Motion #1, the application to state the case to the Divisional Court as to whether the serving by the Registrar of Real Estate and Business Brokers of the Notices of Further Particulars dated October 25, 1993 upon the Applicants would, if the Tribunal were a court of law, have been a contempt of that Court. This Motion is brought pursuant to the provisions of section 13(c) of the Statutory Powers Procedure Act of Ontario which reads, in part, as follows:

13. Where any person without lawful excuse,

- (c) does any other thing that would if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court the tribunal may, of its own motion or on the motion of a party to the proceeding, state a case to the Divisional Court setting out the facts and that court may inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the court.

We have concluded that the wording of clause (c) of the section should be read as including any act or omission on the part of the alleged contemnor which would, if the Tribunal were a court of law, have been contempt of that Court. This point was stated judicially in the case of:

Re: Ajax & Pickering General Hospital et al vs. Canadian Union of Public Employees et al (1981) 32 O.R. (2d) 492.

A union was directed by the Ontario Labour Relations Board to cease and desist from an unlawful strike. The unlawful strike nevertheless occurred. The Board had filed a copy of the Direction with the Registrar of the Supreme Court pursuant to section 83(a) of the Act and the employers sought to have the union and its officers declared in contempt after the unlawful strike had ceased.

Held: The application should be dismissed. The only purpose of registering the Order with the Registrar of the Supreme Court was to provide a means of enforcing it. Compliance with it now having been effected, that is the end of the matter in the Supreme Court. If the Labour Board or the employers had wished to punish those responsible for the breach of the order they should have proceeded under section 13 of the Statutory Powers Procedure Act.

per Hughes J. at page 498:

Before leaving the matter, I should acknowledge Mr. Mitchell's having directed my attention to section 13 of the Statutory Powers Procedure Act 1971 (Ont.) c.47 which he suggested provided an alternative and acceptable procedure to the one contemplated by Mr. Gray. (He then quoted the section which was in the same form as found today and went on). I agree that the section, eliminating clauses (a) and (b) would be appropriate as a remedy for the Applicants' complaint in the case at bar although its application is not a necessary ingredient of my decision to dismiss this application. Mr. Gray objected that the wording of paragraph (c) is in the nature of ejusdem generis and that the section as the whole should be confined to the case of compelling the attendance of witnesses at a hearing of an administrative tribunal.

It seems to me that the section is one of general application enacted in accordance with the recommendation of Chief Justice McRuer's enquiry into Civil Rights of which the Ontario Labour Relations Board or any party to a proceeding before it may make use, and its existence as a remedy for the punishment of contempt in spite of

compliance strengthens my view as to the impropriety of the proceeding under section 83(a) of the Labour Relations Act.

We were referred to no authorities and have been unable to find none under section 13 of the Statutory Powers Procedure Act dealing exactly with what is the mandate of this Tribunal and exactly what is the mandate of the Divisional Court under the section and exactly where is the line of division between the two. From our reading of the section, it is our view that our mandate is to examine all of the relevant facts and determine whether or not, in our opinion, they make out a prima facie case to be stated to the Divisional Court under this section. If they do not, we should dismiss this motion and state no case. If they do, and we find that they do, however, we should state such case and it will then become the mandate of the Divisional Court to proceed as directed in the latter part of the section. Support for this conclusion is found in the judgement of the Ontario Court of Appeal in:

Re: Yanover & Kiroff and The Queen, (1974) 6 O.R. (2d), 478.

This was an application to the Divisional Court which went therefrom to the Court of Appeal from a Commission under the Public Enquiries Act under a provision similar to that found in section 13 of the Statutory Powers Procedure Act. The Commission had stated a case to the Divisional Court that certain witnesses were in contempt in that they had refused to attend and testify in answer to a subpoena or summons. The Divisional Court had found them in contempt and sentenced them to a term of imprisonment of five months suspended until further order pending re-appearance by the witnesses before the Commission and ordering each witness to pay a fine of \$1,000 or serve an additional term of three months in default. The witnesses appealed to the Court of Appeal under Section 9 of the Criminal Code.

per Estey J.A. at page 482:

It is my view that, in the light of the variations in the powers of a commission brought about by the enactment of the Act and the repeal thereby of the Public Inquiries Act, R.S.O. 1960, c.323, the powers of a commission now are essentially, if not exclusively, investigatory and are not judicial. When the authority of a commission to do any act or thing is called into question the power vested in the commission is limited to stating or refusing to state a case for the opinion of the Divisional Court. Nor has a commission the power it enjoyed under the former Act, now repealed, to enforce the attendance of witnesses and to compel them to give evidence and produce documents and things "as is vested

in any court in civil cases". Specifically a commission no longer has the power to adjudge the conduct of a witness before it to be punishable contempt and to impose punishment for such conduct.

Notwithstanding the removal from a commission of the power of punishing for contempt of it, it continues to be recognized that for the proper discharge of its duties under a commission issued under the Act, it is essential that the disobedience to or defiance of the lawful requirements of the commission attract punishment of the nature that Courts have traditionally meted out to those in contempt of Court. Nevertheless the legislation has denied to a commission any punitive power.

Where the commission alleges that a person without lawful excuse has refused to answer a question, its remedy is limited to invoking the provisions of s.8. Section 8 reads as follows:

8. Where any person without lawful excuse,
 (a) on being duly summoned under section 7
 as a witness at an inquiry, makes default
 in attending at the inquiry; or

(b) being in attendance as a witness at an
 inquiry, refused to take an oath or to
 make an affirmation legally required by
 the commission to be taken or made, or to
 produce any document or thing in his power
 or control legally required by the
 commission to be produced to it, or to
 answer any question to which the
 commission may legally require an answer;
 or

(c) does any other thing that would, if
 the commission had been a court of law
 having power to commit for contempt, have
 been contempt of that court,

the commission may state a case to the Divisional Court setting out the facts and that court may, on the application of the commission or of the Minister of Justice and Attorney General, inquire into the matter and, after hear any witnesses who may be produced against or on behalf of that person and after any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court.

It is the view of the Tribunal that once the Order of October 15, 1993 was made by the Chair of the Tribunal, the Registrar was bound by it and was obliged to follow it unless and until it were set aside, varied or reversed. See

Attorney-General British Columbia v. Mount Currie Indian Band (1991) 54 B.C.L.R. (2d) 129:

An injunction had been issued regulating conduct of natives on unceded Indian territory and an application was brought to find certain persons in contempt of that injunction. On the motion for contempt, it was argued that the Court did not have jurisdiction over natives conduct on unceded Indian territory.

per Macdonald J. at page 143:

This Court purported to exercise jurisdiction over the conduct of the persons arrested when the Chief Justice issued the injunction. Whether he was right or wrong in so doing will ultimately be determined on appeal, but in my view his "capacity" to make such an order is unquestioned. Having so ordered, it was not open to the persons arrested to defy the order. In that regard, I have the jurisdiction to determine their guilt or innocence on the contempt charges they face.

The Tribunal must now consider what action it should take based upon what has been outlined above. The question as to whether there is a prima facie case against the Registrar for his having issued the Notices of Further or Other Particulars on October 25, 1993 and having included the material ordered withdrawn in his volumes delivered on March 1, 1994 turns upon whether, in so doing, he was acting in disobedience of an order of the Tribunal, which, if it had been a Court, would have constituted contempt of that Court.

It is a general principle of law that disobedience of Court orders is contempt of Court. This principle was applied by the Alberta Court of Appeal to an order of the Alberta Labour Relations Board prohibiting a strike by a trade union after which the union proceed with the strike. See

United Nurses of Alberta v. Attorney-General of Alberta (1990) 66 D.L.R. (4th) 385

In this case a directive of the Board against the union was filed with the Court of Queens Bench and on two occasion, the union was found guilty of criminal contempt by judges of the Court of Queens Bench. On appeal to the Court of Appeal, the convictions were upheld.

The elements which must be proved to establish a contempt for breach of an order are set out in section 36 on page 42 of the Chapter on Contempt of Court in the 3rd ed. of the C.E.D. (Ont.). In order for the Court to punish for contempt for breach of a Court Order, the following elements must be proved beyond a reasonable doubt: the terms of the Order must be clear and unambiguous (the terms of the Order of the Tribunal on October 15, 1993 were clear and unambiguous), proper notice must be given to the contemnor of the terms of the Order (the Registrar had full knowledge and fully understood the terms and meaning of the Order), clear proof must exist that the terms have been broken by the contemnor (the delivery of the Notices on October 25, 1993 and of the volumes containing the copies of the impugned material on March 1, 1994 were a direct breach of the terms of the Order) and the appropriate mens rea must be present (the Registrar signed the Notices on October 25, 1993 and swore the Affidavit of December 3, 1993 in which he stated in so many words that he had done exactly that with which he is being charged.) This appears to us to make out the prima facie case which is required.

There is one other consideration, however, to which we believe we must turn our minds and that is whether the breach of this type of order is of such consequence to warrant this response to it. We believe the conduct of re-delivering these allegations which have been struck out in these circumstances must be viewed in the context of all of the difficulties which the Applicants had encountered to get their matter heard, the previous occasions when materials with new allegations had been delivered at the last minute resulting in adjournments, the developments which had led to the making of this application for the adjournment by the Applicant on October 15, 1993 and the fact that, as we have noted, the impugned actions on the part of the Registrar appear to have been an attempt, successful in the first instance, to get away from the Order of October 15, 1993 and to get a hearing with all of the material before the Tribunal which was something that, it was obvious to everyone the Tribunal was not prepared to allow.

All of these matters to which we have referred since concluding there is a prima facie case here are matters upon which the Divisional Court may wish to hear evidence or argument and it may well be that, when everything which is brought before it upon hearing the stated case has been considered, the whole case may present itself in a different light. However, upon the material before us, we find there is a prima facie case to be stated as sought by the Applicants in Motion #1 and we shall do so. An important consideration in our minds in coming to this conclusion is that, prima facie, we appear to have here a deliberate attempt to circumvent a direct Order of the Tribunal by conduct which should not be allowed and we see no other sanction which can be brought against it.

In considering the matter, we have been concerned with some of the conduct of Mr. Glass as a solicitor and as counsel for his client. Undoubtedly, he must take a major responsibility for the delivery on October 25, 1993 of the Notices of Further and Other Particulars by the Registrar which we have found to be conduct which would have, prima facie, established a contempt of Court if the Tribunal had been such a Court. While conduct on the part of counsel which has the foreseeable result of getting his client into serious trouble such as this may not necessarily constitute a contempt on his part, it is certainly conduct for which he may be open to some chastisement by the Law Society. Also in this context, consideration should be given to Mr. Glass' actions in charging bias against the Tribunal. Legal authorities certainly indicate that insulting language and discourteous and disrespectful behaviour during a legal proceeding are reprehensible conduct on the part of Counsel. Throughout the proceedings, in much of his comportment, Mr. Glass has shown disrespect and highhanded disregard for the authority of the Tribunal. Moreover, throughout, he never indicated any regret or apology for any of his conduct, even when purporting to withdrawn offending material.

We consider the conduct of Mr. Glass in both respects discussed above sufficiently reprehensible that it should not be let go without some chastisement and we shall deal with this in two ways. In the first place, we have expressed this criticism of his conduct in this judgment. In the second, we shall refer a copy of this judgment to the Discipline Committee of the Law Society of Upper Canada with an explanation that we are doing so to give the Society an opportunity of considering what action it might wish to take with regard to it.

We come now to what has been termed Motion #2. We shall deal first with the second grounds put forward, namely that the conduct of the respondent Registrar has resulted in a denial to the Applicants of rights guaranteed to them by section 7 of the Canadian Charter of Rights and Freedoms. The Tribunal agrees with Mr. Torbin's submission that section 7 of the Charter does not cover any rights being claimed by the Applicants in these proceedings. see

Haddock et al. and Attorney-General of Ontario (1990) 70 D.L.R. (4th) 644:

In this case, the Plaintiffs were small businessmen who had invested in an apartment building to generate income and found themselves substantially disadvantaged by the Ontario Rent Control legislation and attacked the same as an illegal infringement of rights guaranteed to them under the Charter.

Headnote at p.645:

The impugned legislation does not violate any right protected by s.7 of the Charter. Although the applicants' realization of income and value from their investment was part of the process of earning a livelihood which might be recognized as an interest of fundamental importance to individuals, the applicants have not been deprived of a means of livelihood necessary to their post-retirement survival. Their complaint is merely that their investment is not as lucrative as they would like as a result of the impugned legislation. This is not a matter that engages the guarantee of s.7 of the Charter. If this result is unacceptable to them they are free to liquidate their assets and invest their proceeds in more profitable income-earning investments.

per Henry J. at p.660:

He further submits that the rights at issue in this application represent in essence the right to earn a livelihood. The quality of life of the Haddock brothers and their ability to earn a living is at issue here. This right, he says, is constitutionally protected by s. 7 of the Charter.

I simply do not agree. In this province the courts have consistently held that the expression "liberty and security of the person" in s.7 relates to a person's physical and mental integrity and one's control over these. It does not describe any right of a corporation or the purely economic interests of a natural person; nor does s.7 guarantee the right to unrestrained business activity or to practise a particular profession or occupation.

See also Cosyns v. Attorney General of Canada (1992) 7 O.R. (3d) 641, a decision of the Divisional Court:

Headnote at p.641:

The plaintiff's s.7 claim was based on an assertion that the right to earn a livelihood is a constitutionally protected right under s.7. The expression "liberty and security of the person" in s.7 does not encompass economic interests and, in particular, does not include the right to earn a livelihood. Moreover, none of the allegations in the statement of claim disclosed a basis for finding a contravention of the principles of fundamental justice. Accordingly, there was no possibility that the plaintiff's s.7 argument could succeed at trial.

per Rosenberg J. at p.652 (bottom):

In Ontario the courts have consistently held that the expression "liberty and security of the person" in s.7

relates to a person's physical and mental integrity and one's control over these, and does not guarantee economic interest. In R. v. Miles of Music Ltd. (1990), 74 O.R. (2d) 518, 48 C.C.C. (3d) 96 (C.A.), at p.530 O.R. p. 109 C.C.C., Mr. Justice Krever stated:

Moreover, the economic right to carry on a business or earn a livelihood is not a right included in the right of security of the person.

In Irwin Toy Ltd. v. Quebec (Attorney General) [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, at p.1003 S.C.R., pp.632-33 D.L.R., Dickson C.J.C., in reference to s.7, stated:

What is immediately striking about this section is the inclusion of "security of the person" as opposed to "property". This stands in contrast to the classic liberal formulation, adopted, for example, in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provide that no person shall be deprived "of life, liberty or property, without due process of law". The intentional exclusion of property from s.7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person."

See also Biscotti, Costantini and Orton v. Ontario Securities Commission (1990) 74 O.R. (2d) 119 - Divisional Court at p.123

per Moldaver J.

Ontario Courts have uniformly held that the rights protected by s. 7 of the Charter do not include a right to engage in a particular type of professional activity or regulated economic sector. Attached as Appendix A is a list of these authorities. The Supreme Court of Canada has yet to decide this issue.

This decision was taken to the Court of Appeal (see Biscotti et al v. Ontario Securities Commission (1991) 76 D.L.R. (4th) 762 which dismissed the appeal.

At p.765 **Brooke J.A.** says:

For the reasons given by Moldaver J., I would dismiss the cross-appeal as it relates to the application of the Charter, and to the pre-hearing disclosure and severance.

The Applicants, therefore, do not succeed with this argument under section 7 of the Charter. Neither do we conclude that they can succeed upon the first ground put forward in the Notice of Motion. The authority of the Tribunal to deal with a Proposal of the Registrar to refuse to grant or renew a registration or to suspend or revoke a registration is found in section 9(4) of the Real Estate and Business Brokers Act which reads as follows:

- 9(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

It is clear that the Tribunal may make an order as provided by this provision only after holding a hearing. The direction that the Tribunal shall appoint a time and hold a hearing is mandatory. It, therefore, has no power to deal with the Proposal without holding a hearing as mandated and any attempt to do so should result in the matter being sent back to the Tribunal to carry out its function properly. The Applicants seek to justify this result sought on the basis of the provisions of section 13(1) of the Statutory Powers Procedure Act which reads:

- 23(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuses of its process.

In our opinion this provision does not extend to the making of an order to the Registrar to refrain from carrying out his proposals without holding a hearing and deciding the issue on the merits as they appear upon the evidence. This provision relates to procedural rulings rather than to substantive jurisdiction - how a case is to be heard rather than whether it is to be heard.

This view is supported by the provisions of section 7(2)(b) of the Ministry of Consumer and Commercial Relations Act which reads:

7(2) The Tribunal shall,

- (a) advise the Minister on consumer affairs; and
- (b) hold such hearings and perform such other duties as are assigned to it by or under any Act or regulation.

In two cases cited to us, appeals were taken from the Tribunal to the Divisional Court in which Registrars argued that the Tribunal had made orders against them to refrain from carrying out their Proposals without holding a proper hearing or properly considering the merits of the Proposals. The Divisional Court found the Tribunal had, in fact, erred in this respect and ordered that the matters be remitted back to the Tribunal to hold a proper hearing and to make a determination of the issues in the proper way.

See In Re Brenner (1983) 19 CRAT 58

This case is often cited in support of the proposition that the Tribunal should only refuse to direct the Registrar to carry out a Proposal if it thinks the Registrar was in error in concluding that the past conduct of an applicant afforded him reasonable grounds for belief that he would not carry on business in accordance with the law and with integrity and honesty. The decision is of assistance to us here on somewhat different grounds.

After finding that the Tribunal erred in its decision to direct the Registrar to grant a conditional registration, the Court went on to say -

per Southey, J:

Almost a year has now elapsed since the Board gave its decision. The Registrar did not apply for a stay of the operation of the Tribunal's decision and the result is that Brenner received his licence and, as far as counsel is aware, has been employed as a motor vehicle salesman by Mr. Winkler's company since April 14, 1982. In these circumstances we think it would be unjust for us to set aside the order of the Tribunal and to direct the Registrar to carry out his proposal, which is based on the facts as they existed at July 15, 1981. It may be that the

Tribunal, if it heard the matter afresh and gave effect to the principles that we have laid down in our reasons, might now be able to conclude that the past conduct of Brenner no longer affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, despite his lengthy criminal record. Such a conclusion might be reached after a consideration of his conduct during the past year and if Brenner adopts a more forthright attitude in his evidence regarding the conviction for fraud in Michigan or gives a credible explanation as to why he refused to reveal to the Tribunal the nature of the offence to which he pleaded guilty.

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

Accordingly, we refer the matter back to the Tribunal for rehearing with the direction that the order appealed from remain in force as a interim order until the Tribunal has given further consideration to the matter at a second hearing.

In the more recent case of Joseph H. Vogelsberg, a decision issued on October 29, 1992, the Tribunal ordered the Registrar of Real Estate and Business Brokers to refrain from carrying out his Proposal to revoke a real estate broker's registration, but rather suspended it for three months and then allowed him to continue on conditions. The Registrar appealed to the Divisional Court and that Court sent the matter back to the Tribunal for a rehearing. In reasons for Judgment issued on February 7, 1994,

Saunders J. said:

We are all of the view that the decision of the Tribunal cannot stand for the reasons submitted to us by counsel for the

appellant. The Tribunal did not make a finding as to whether or not the impugned activities were in contravention of the Act or the regulations. Furthermore, and more importantly, the Tribunal did not make a determination as to whether or not the past conduct of the respondent afforded reasonable grounds for belief that the respondent would not carry on business in accordance with law and with integrity and honesty. With respect, we are of the view that the legislation required that both determinations be made.

.....
 The issue then becomes whether this court should make an order that the Registrar carry out the proposal or send the matter back to the Tribunal for further consideration. After anxious consideration, we consider, in all of the circumstances, that the appropriate course is to send the matter back, as was done in Richard G. Brenner v. Registrar of Motor Vehicle Dealers and Salesmen.

The Tribunal also dealt with this point directly in the case of Stephen Kuban (1992) 23 CRAT 371. In this case, Proposals had been issued by the Registrar of Real Estate and Business Brokers to revoke registration of three parties, a Re/Max corporation and one Latini as brokers and Kuban as a salesperson. Ten days of hearings had gone on and apparently when the Motion was brought on behalf of Kuban on which this judgement was given, the Tribunal was still "in the middle of the hearing". The motion was apparently brought on behalf of Kuban to relieve him of the burden of having to be present and have counsel present at this long hearing, only a part of which concerned him and the relief sought was either to have the Tribunal hear evidence on the merits with respect to Kuban in advance of the evidence with respect to Latini and Re/Max or alternatively, to direct the Registrar to refrain from carrying out his proposal with respect to Kuban without a hearing. The Tribunal dismissed the motion. In giving its judgment, the Tribunal said: "As I have stipulated, the authority under subsection (4) of section 9 to permit us to substitute our opinion for that of the Registrar requires us to conduct a hearing so that to direct the Registrar not to carry out his Proposal without a conducting a hearing is totally inappropriate".

The Ontario Court (General Division) also has dealt with this point directly in the case of Chokan v. Cameron (1992) 33 A.C.W.S. (3d) 150 and 16 W.C.B. (2d) 1 (March 27, 1992 Ontario Court (General Division)).

per MacFarland J. Order No. 092/115/010.

This was an appeal by an involuntary hospital patient from a decision of a Review Board constituted pursuant to the Mental Health Act of Ontario. The patient had been certified under the provisions of the Act, but a Certificate of Renewal of that certificate was eventually rescinded by an order of a Review Board.

An appeal had been launched by a psychiatrist from that decision, but the appeal was abandoned and the same day, the patient was recertified. The patient argued here that the recertification by the hospital breached his rights under section 7 and section 9 of the Charter of Rights, a subsequent Review Board having concluded that it would make a finding regarding the patient's status as of the current date, from which preliminary ruling the patient now appealed.

Held: A Review Board constituted under the Act could not take unto itself a substantive jurisdiction it did not otherwise have by virtue of section 23(1) of the Statutory Powers Procedure Act which provides that a Tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent an abuse of its processes. Section 23 was never intended to bestow upon tribunals substantive jurisdiction not otherwise available to the tribunal in its enabling legislation.

These statutory provisions and judicial pronouncements quoted appear to the Tribunal to establish that the Tribunal can only make an order under section 9(4) of the Real Estate and Business Brokers Act after having held a hearing on the merits and after having made its decision after a proper consideration of the evidence. This being so, the Tribunal does not have jurisdiction to grant the relief sought on behalf of the Applicants on the second Motion and it will serve no purpose for us to consider further arguments that such relief should have been granted if there had been jurisdiction to do so.

However, the Tribunal has concluded that because of the delay caused by the Registrar in getting on with this hearing on the merits and other conduct on his part in connection with this matter which we have outlined above and which is open to criticism, the Applicants are entitled to some relief from the situation which prompted this motion. They should be entitled to an order that the hearing of these matters on the merits be held by the Tribunal at the earliest date when the same can be done; that the Order of the Chair of the Tribunal made on October 15, 1993 be given full force

and effect, together with the undertakings of counsel given at the hearing of October 18, 1993; that the matters proceed to a hearing upon the allegations and particulars contained in the original Notices of Proposal and the Notices of Further or Other Particulars which were properly before the Tribunal at the opening of the hearing on October 18, 1993; that no new Notices of Further or Other Particulars be allowed unless they refer to allegations of facts which came into existence after October 18, 1993 and unless such Notices of Further or Other Particulars are served upon both the Applicants and their solicitors 45 days before the opening of the hearing.

ORDERS OF THE TRIBUNAL

With Regard to Motion #1 - In accordance with the foregoing, the Tribunal hereby states a case to the Divisional Court to determine whether upon the facts as we have found them, the conduct of the Registrar of Real Estate and Business Brokers would, if the Tribunal were a Court of Law, have been a contempt of that Court, these facts being:

After a considerable amount of delay brought about substantially, but not entirely, by the Registrar the hearing of these matters was fixed to proceed before a 3-member panel of the Tribunal on Monday, October 18, 1993 in Ottawa. In spite of previous difficulties and problems caused by his having delivered Notices of Further or Other Particulars on too short notice before scheduled hearings and having put the Applicants' counsel in a position of requiring adjournments to deal with them and certain undertakings having been given and orders made for the purpose of avoiding a recurrence of this being done, the Registrar issued a new pair of Notices of Further or Other Particulars against each of the Applicants. These were mailed on September 29, 1993 to the Applicants with no copy to their solicitors although the Registrar and his counsel well knew of him and his concerns with regard to new allegations at the hearing.

These facts, coupled with the fact that the Notice sent to Mr. Morphy was sent to a wrong address, resulted in the Applicants' counsel not becoming aware of the new allegations until October 14th which caused him to write to counsel for the Registrar stating that he would be objecting to the introduction of these new Notices or any evidence in support of them at the hearing and stating that, if the Registrar's counsel did not agree to this position, he would be seeking an adjournment.

Counsel did not agree and on October 14, the parties were facing the opening of what was expected to be at least a 2-week hearing in Ottawa commencing the following Monday, October 18

without knowing whether it would be proceeding or not. As a means of solving this problem, both counsel asked the Chair of the Tribunal to hear a motion by conference telephone call on Friday, October 15 for an adjournment requested by Mr. Burnet and opposed by Mr. Glass. At the conclusion of this argument, the Chair ruled that the hearing should proceed on the 18th as scheduled and that the offending Notices of Further or Other Particulars should be withdrawn, and that evidence in support of them not be presented in support of the Registrar's case.

On October 18, the Registrar had two choices either to proceed with the hearing on the terms and conditions laid down in the Order of October 15 or attempt to have it set aside through an Application for Judicial Review so he could proceed with a hearing where he could use the impugned Notices. At the opening of the hearing, counsel for the Registrar stated he had opted for the latter course and asked for an adjournment so he could put it into effect. For reasons outlined above, counsel for the Applicants consented to this and the Tribunal made an Order accordingly, stating that it did so upon the express condition that the Application for Judicial Review be launched within 30 days and, we conclude, an implied condition that it be pursued to a hearing. Clear undertakings were given to the Tribunal by Mr. Glass which re-enforce this view.

On October 25, 1993, the Registrar then delivered two new Notices of Further or Other Particulars against each of the Applicants identical as to wording with the two which he had been ordered to withdraw by the Order which he had undertaken to attack by the motion for judicial review. In doing so, he must clearly have intended to use these last Notices at the hearing when it finally came on, which would render completely moot any decision which would be made upon the judicial review. It is therefore a fair inference from the action in issuing these Notices on October 25 that he intended at the eventual hearing to disregard the Order of October 15. In any event and indeed, it can be inferred from a subsequent withdrawal of his notice for judicial review that he was no longer concerned to seek a successful outcome of it because he believed he had achieved the same result by the course he had followed. This view is re-enforced by the last paragraph of the Registrar's Affidavit of December 3, 1993 aforementioned.

With Regard to Motion #2 - In accordance with the foregoing decisions, the Tribunal hereby:

1. Dismisses the application of the Applicants for an Order that the Registrar refrain from carrying out his Proposals to refuse to grant the registration of the Applicants without a hearing on the merits.

2. Orders that,

(1) The hearing of these matters on the merits be held by the Tribunal at the earliest date when this can be done.

(2) That, at this hearing, the Order of this Tribunal made on October 15, 1993, be given full force and effect, together with the undertakings of Counsel given at the hearing on October 18, 1993, so that the matter proceed to a hearing upon the allegations and particulars contained in the original Notices of Proposal and the Notices of Further or Other Particulars which were properly before the Tribunal at the opening of the hearing on October 18, 1993; and

(3) That no new Notices of Further or Other Particulars be allowed unless they refer to allegations of facts which came into existence after October 18, 1993 and unless such Notices of Further or Other Particulars are served upon both the Applicants and their solicitors 45 days before the opening of the hearing.

MOHAMMED RAGE

APPEAL FROM A DECISION
OF THE BOARD OF TRUSTEES OF THE
TRAVEL INDUSTRY COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding

APPEARANCES:

SHEILA RIDDELL, representing the Applicant

SUSAN CAMPBELL, representing the Board of Trustees
of the Ontario Travel Industry Compensation Fund

DATE OF

HEARING: 30 November 1994

Toronto

REASONS FOR RULING

UPON hearing submissions by counsel for the Applicant and counsel for the Board of Trustees of the Ontario Travel Industry Compensation Fund, the Tribunal adjourns the hearing in this matter. The next date for hearing before this Tribunal is peremptory to the Applicant.

AND FURTHER upon consent of both counsel, the Tribunal adjourns the hearing to commence Wednesday, December 14th, 1994 at 9:30 a.m.

ONTARIO COURT OF JUSTICE
(Divisional Court)

VASILIOU ET AL. v. HOMELAND FUNDING INC.

ENDORSEMENT

This is an appeal from the decision and order of The Commercial Registration Appeal Tribunal dated October 5, 1992, directing the Registrar of Mortgage Brokers to refrain from carrying out his proposal to revoke the registration of Homeland Funding Inc. as a mortgage broker under the Mortgage Brokers Act, R.S.O. 1990, c. 39. The Registrar seeks an order from the Divisional Court directing him to carry out his proposal.

It is the position of the Registrar that the Tribunal erred in law and fact in failing to find that the past conduct of Arnold Saul Handelman, officer and director of Homeland, affords reasonable grounds for belief that the business of Homeland will not be carried on in accordance with law and with honesty and integrity within the meaning of s. 5(c)(ii) of the Act. The nine day hearing before the Tribunal took place in February, May and July 1992 and the decision directing the Registrar to renew the registration of Homeland Funding Inc. was released on October 5, 1992. The lengthy reasons of the Tribunal review the major allegations against Handelman, and the position taken by him and his counsel with respect to these allegations. The reasons also review at length the oral evidence of the various witnesses called by the parties and the final submissions of counsel. Unfortunately, the Tribunal makes no specific or helpful

findings of fact and its conclusions found in two brief paragraphs on page 49 of the reasons merely state:

The facts of Arnold Handelman's disbarment (allegations 3 and 9) as well as his personal bankruptcy are admitted. We find that these facts alone do not lead to a conclusion that the business of Homeland Funding Inc. will be carried on or has in the past been carried on in breach of the Mortgage Brokers Act.

In the overall development of these two projects and with experienced investors being involved, we find that the other allegations are not clearly proven as against Homeland Funding Inc. and that the Registrar's reliance on them as reasons to revoke the registration of Homeland Funding Inc. is not reasonable. We accept the evidence that Arnold Handelman was a developer whose projects and profits failed in a serious downturn of the economy. We find that Homeland Funding Inc. was not involved directly in those projects after Phase 1 of Coventry Park, and that its mortgage broker licence to carry on the work which is now being done without complaint under the supervision of the Registrar should continue.

It is the undisputed evidence that Handelman was admitted to the Ontario Bar in 1967, he was disciplined by the Law Society in 1980 and found guilty of conduct unbecoming a barrister and solicitor. His right to practice was suspended for six months. On August 7, 1981, Homeland was registered under the Act and Mr Handelman and his law partner were the officers, directors and shareholders. In August 1990, the respondent's wife, Elaine Handelman, purchased all of Homeland's shares after her husband's personal bankruptcy in February 1991. She was not a witness at the hearing and is

employed as a school psychologist by the North York Board of Education. Mr. Handelman was disbarred by the Law Society of Upper Canada on January 23, 1992, in accordance with an agreed statement of facts filed with the Tribunal. According to the evidence, the facts which gave rise to Mr. Handelman's disbarment and the Registrar's proposal arose out of his involvement in two condominium townhouse projects known as Coventry Park and Foxwood Trail Estate (the Nellwood Project).

We find that a review of the exhibits filed with the Tribunal and the transcript of the hearing supports a finding that there was ample evidence before the Tribunal to prove that Mr. Handelman was using his role as lawyer, mortgagee, and developer to mislead his investors and his clients. Letters filed with the Tribunal on his legal stationery establish not only that he misrepresented priority of mortgages and postponements of mortgages but also that he failed to tell his investors of his personal interest in the projects and arbitrarily transferred them from one project to another without their knowledge or consent. He breached the rules of the Law Society by personally guaranteeing mortgage funds. As well, there is reliable expert evidence which strongly suggests that his conduct caused investors and clients to lose substantial sums of money.

Having reviewed the material filed on this appeal and the submissions of counsel, we are satisfied that the Tribunal erred by failing to make specific findings of fact in relation to the serious disputed allegations of Mr. Handelman's misconduct. The Tribunal also erred in law by

applying the wrong test when it found that the allegations were not proven against Homeland. The past conduct of officers and directors is relevant to a determination as to whether there are reasonable grounds for belief that the corporation's business will not be carried on in accordance with law and with honesty and integrity. It is the duty of the Registrar and this Court to protect the public and we are convinced that all of his conduct, as lawyer, mortgagee, and developer justifies a finding that the Tribunal's errors caused it to fail to properly assess the issue before it. The factual findings on the evidence could only lead to the denial of registration under the Act.

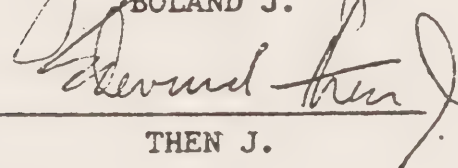
The appeal is allowed, the Tribunal's order is set aside and it is ordered that the Registrar carry out the proposal to refuse registration to Homeland Funding Inc. The appellant is not seeking costs.



HARTT J.



BOLAND J.



THEN J.

DATE: February 11, 1994

ONTARIO COURT (GENERAL DIVISION)

DIVISIONAL COURT

(HARTT, O'DRISCOLL and MOLDAVER JJ.)

IN THE MATTER OF THE Motor Vehicle Dealers Act, R.S.O.
1990, c.M.42

B E T W E E N:

The Motor Vehicle Dealers
Compensation Fund

Appellant

- and -

Maria Didaskalou

Respondent

) L.A. Banack for the
) appellant
)

) P. Haber for the
) respondent
)

)
)
)
)
)

E N D O R S E M E N TBY THE COURT:

This appeal concerns the factors to be considered and tests to be applied by the Board of Trustees when a claim is made to the Motor Vehicle Compensation Fund under s.12(3)(1) of the Schedule to Regulation 801 pursuant to the Motor Vehicle Dealers Act, R.S.O. 1990. c.M.42. Section 12(3)(1) reads:

s.12(3) A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participants' refusal or

failure to pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements:

1. The customer has recovered in any court in Ontario a judgment in respect of the claim and the judgment has become final by reason of the expiration of the time for appeal or of having been confirmed by the highest court to which an appeal may be taken and the customer makes an application, supported by the judgment and statement of claim, for payment of the unsatisfied portion of the judgment and costs as assessed.

In our view, when a claim under this provision is made, the Board of Trustees cannot look behind the judgment to decide whether the judge erred in awarding damages or in fixing the amount of those damages. Instead, pursuant to the definition of "claim" in s.1 of the Schedule, the Trustees are simply required to decide (a) whether the damages awarded amount to a claim for a pecuniary loss and, if so, (b) whether they arose out of a transaction involving a trade in a motor vehicle.

Although the appellant argued that the term 'pecuniary loss' did not include unliquidated damages, we disagree. In some instances in the Schedule, the Legislature has made it clear that only liquidated damages may be claimed (see ss.12(3)(2) and (3)).

No such restriction exists for a claim, such as the one at hand, under s.12(3)(1).

In order to amount to a pecuniary loss under s.12(3)(1), the loss must simply be one which is capable of evaluation on a monetary basis. While such a loss would not, by way of example, include damages for pain and suffering, it would, as the tribunal found, include damages referable to the excessive price paid for a motor vehicle and the cost of repairs.

However, mere pecuniary loss will not of itself lead to a successful claim under s.12(3)(1). The loss must be shown to have arisen out of a transaction involving the trade in a motor vehicle.

In this case, we are satisfied that the amount of \$3,500, representing the excessive price which the respondent paid for the car, clearly met the second part of the definition of "claim" (*supra*).

We take a different view of the repair costs. In the particular circumstances of this case, we are not persuaded that those costs were sufficiently linked to the transaction such that they could be said to have arisen from it. To that extent, we are of the view that the Tribunal erred in allowing for those costs.

In the result, we would allow the appeal in part and reduce the amount of the award by \$2,254, representing repair and transportation costs.

That leaves the cross appeal concerning the question of legal costs, which Potts J. fixed at \$2,200. The Tribunal disallowed those costs on the ground that they were fixed, not assessed.

In our view, the Tribunal erred in so finding. In fixing costs, the trial judge was simply making an assessment of the fees and disbursements which in his opinion, the successful party was entitled to. We do not believe that it was the intention of the Legislature to require a formal hearing before an assessment officer as a prerequisite to a claim for legal costs. Such a requirement would be wasteful, inefficient, costly and a drain on resources which are already strained.

We have therefore concluded that the cross appeal should be allowed and the award increased by the amount of \$2,200, representing the costs fixed by Potts J.

In argument before us, counsel for the appellant in the cross appeal advised that as a result of the Tribunal's ruling on the matter of costs, he had attended before an assessment officer who

had assessed costs. We wish to make it clear that in our view, the assessment officer had no authority to engage in such an assessment where, as here, the trial judge had made an order fixing the costs.

In the result, the appeal is allowed in part and the cross appeal is allowed.

If the parties cannot agree, they may make submissions in writing to the court on the issue of the costs of this appeal within ten days of the release of these reasons.

J. J. G. G. G.

Hart

M. Alden J.

ONTARIO NEW HOME WARRANTY PROGRAM

Title of proceeding)

Appellants

and LOUIS FELDHAMMER and G. JEANNE MCGUIRE

Respondents

Court file no. 683/93

DIVISIONAL COURT

BEFORE

DATE

DISPOSITION - THIS APPEAL

APPLICATION IS

RECEIVED

JUL 4 1994

COMMERCIAL REGISTRATION
APPEAL TRIBUNAL

June 24/94.
 The decision of the Tribunal is tantamount
 to a recognition of compliance with S. 13 (3) and
 in the circumstances, we find no reason
 to interfere with the disposition.
 No order as to costs.

Hartt J.

ONTARIO COURT OF JUSTICE

RECEIVED

(GENERAL DIVISION)

JAN 5 1995

DIVISIONAL COURT

O'DRISCOLL, O'BRIEN and WHITE JJ.COMMERCIAL REGISTRATION
APPEAL TRIBUNAL

B E T W E E N:

RIAZ HAIDER

Applicant
(Appellant))
)
) Diane Stortini
) for the Applicant

- and -

ONTARIO NEW HOME WARRANTY PROGRAM

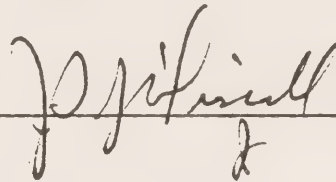
Respondent
(Respondent in Appeal))
) Brian Campbell
) for the Respondent)
)
)
)
) Heard: December 1, 1994O'BRIEN J. (Orally)

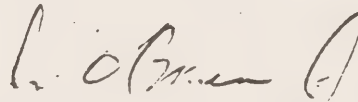
This Tribunal is intended to proceed expeditiously and the appearance of lay claimants seems to be encouraged. The appellant filed a report which he intended to rely upon when appearing before the Tribunal. This was done some months prior to the hearing. There was nothing to indicate to the appellant that the report would not be admitted or that the author of the report would have to be available for cross-examination at the scheduled hearing.

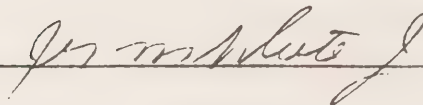
The Chairman, in exercising his discretion, could have admitted the report under s.15(1) of the Statutory Powers Procedure Act, R.S.O. 1990, c.S.22, or he could have granted an adjournment

to accommodate the cross-examination which he felt should have been permitted. The Vice-Chairman, in his reasons in considering the exercise of discretion, does not appear to have considered the possible exercise of discretion under the Statutory Powers Procedure Act and it appear from his reasons that the primary basis for exercise of discretion was on the basis of an appeal which would be taken from his reasons.

In our view, there was an error in the exercise of discretion by the Vice-Chairman on a matter of principle. We therefore feel the appeal should be allowed, the order of the Tribunal set aside and a new hearing directed before a differently constituted tribunal.







65

7654

1042



File No.: 340/92

ONTARIO COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N:

MR. & MRS. E. LACIKA

Applicants

- and -

THE ONTARIO HOME WARRANTY PROGRAM

Respondent

ORDER DISMISSING APPEAL

The appellant has not perfected this appeal, and has not cured the default, although given notice under Rule 61.13 to do so.

IT IS ORDERED that this appeal be dismissed for delay, with costs.

DATED: April 7, 1994

INSCRIT / ENTERED AT TORONTO
IN FILM No.: 947
DANS FILM No.:

ON/LE: 20041994

AS DOCUMENT No.: 652
A TITRE DE DOCUMENT:
PER/PAR: [Signature]

D. Hoyle
D. HOYLE
Assistant Registrar
Divisional Court

26

Court File No. 163/93

DIVISIONAL COURT, ONTARIO COURT
(GENERAL DIVISION)

BETWEEN:

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 813

Appellant.

-and-

675550 ONTARIO LIMITED and
ONTARIO NEW HOME WARRANTY PROGRAM

Respondents

The applicant owner, a condominium, requested conciliation of a claim against a builder under the Ontario New Home Warranties Plan Act in respect of a garage topping. At the time of this request on July 10, 1990, the owner was taking the position with the builder that the entire topping be replaced with a new product and the builder along with the subcontractor and manufacturer of the topping material were offering the repair where needed and to extend the warranty in respect to such repairs. By late October 1990, the builder/subcontractor/manufacturer had offered to extend the warranty for the entire surface of the garage.

The applicant owner, however, retained new lawyers who sent a demand letter giving the builder seven days to agree to full replacement failing which another contractor would be employed to perform same. The builder did not respond within the period allowed and the owner effected full replacement at a cost of \$201,843.40. The owner, thereafter, purported to continue with its conciliation request but now with a damage claim for the \$201,843.40.

The owner acted unilaterally in replacing the topping notwithstanding that the conciliation process under the New Home Warranty Plan which it had initiated was not complete and notwithstanding that the Program was itself of the tentative view that the builder's offer of repair was acceptable in the

circumstances. There was no urgency on the part of the owner to act as it did.


Had the builder performed the repair work, it would have been done with the contractor's forces at cost and with a new product from the manufacturer supplied free to the builder or at cost. There would have been no cost to the owner.

The Program decided the owner had acted unreasonably in refusing the builder's offer of repair and, therefore, determined that the owner had no entitlement to damages under subsection 14(1)(b) of the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. 0.31. Effectively, the Program determined that in light of the builder's reasonable offer, there had been no breach of warranty or, alternatively, that the \$200,000 claim arose from the owner's unreasonable acts of mitigation and not from any alleged breach of warranty.

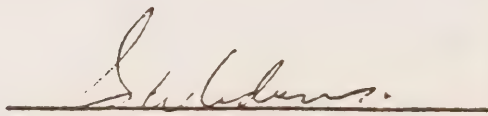
On appeal, the Commercial Registration Appeal Tribunal agreed with the Program's decision and noted there was no proof that the proposed repair work would have been unsatisfactory. We agree with the determinations of both the Program and the Tribunal in this respect.

The Tribunal went on to point out that the owner's unilateral replacement of the topping also prevented the Program from ordering remedial work to be carried out according to subsection 14(3) of the Act and subsection 5(3) of Reg. 892. It also found that the owner's precipitous action compromised the Program's conciliation efforts under section 17 of the Act.

Provided the Program makes every reasonable effort to decide claims on their merits and provided it is practicable for an owner to pursue the statutory procedures without effecting repairs, we find no legal error in this latter determination of the Tribunal pursuant to this Court's powers under subsection 11(5) of the Ministry of Consumer and Commercial Relations Act. We are satisfied there was neither urgency on these facts nor any other basis on which to characterize the owner's actions as reasonable in the circumstances. *Cost in amount of \$5000.00 to 615500 out Limited. NO COSTS to Program.*


CARRUTHERS J.


DUNNET J.


ADAMS J.

336

File No: 682/92

THE ONTARIO COURT OF JUSTICE
DIVISIONAL COURT

THE HONOURABLE MR. JUSTICE HARTT)	WEDNESDAY THE 12TH
)	
THE HONOURABLE MR. JUSTICE MONTGOMERY)	DAY OF JANUARY 1994
)	
THE HONOURABLE MADAM JUSTICE BOLAND)	

BETWEEN:

VLADIMIR BAOTIC

Appellant

- and -

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL AND
MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS
(THE REGISTRAR OF REAL ESTATE AND BUSINESS
BROKERS ACT; MR. GORDON J. RANDALL)

Defendants

ORDER

THIS APPEAL by Vladimir Baotic, Appellant, for an Order setting aside the Decision of the Commercial Registration Appeal Tribunal made in Toronto on the 15th day of September, 1992 directing that the Registrar of Real Estate and Business Brokers Act carry out his proposal to refuse to register the Appellant as a real estate salesperson, and allowing the Appellant to be registered as a real estate sales representative, was heard this day at Osgoode Hall, Toronto.

ON READING the Appeal Books, the Exhibit Book, and the Transcript of the evidence and on hearing the submissions of the Appellant in person and counsel for the Respondent:

1. THIS COURT ORDERS that this Appeal be and the same is hereby dismissed without costs.

D. Hoy

Assistant Registrar, Divisional Court

INSCRIT À/ENTERED AT TORONTO
IN FILM No. 940
DANS FILM No.

ON/LE 18 1048

AS DOCUMENT No. 336
À TITRE DE DOCUMENT No.
PER/PAR:

[Signature]

1049

Court File No. 586 / 1993

ONTARIO COURT OF JUSTICE (GENERAL DIVISION)
DIVISIONAL COURT

BETWEEN:

RAJ P. CHOPRA

REGISTRANT
(Appellant)

and

REGISTRAR OF REAL ESTATE
AND BUSINESS BROKERS

RESPONDENT

ONTARIO COURT OF JUSTICE
COUR DE JUSTICE DE L'ONTARIO
JUDICIAL OFFICE

MAR 23 1994

REGISTERED
DIVISIONAL COURT / COUR
COUP DIVISIONNAIRE

NOTICE OF ABANDONMENT

THE Appellant abandons this Appeal.

DATE: March 23, 1994

RAJ P. CHOPRA
85 Minglehaze Drive
Etobicoke, Ontario
M9V 4W6

Appellant (747-5772)

TO: REGISTRAR OF REAL ESTATE AND
BUSINESS BROKERS
555 Yonge Street
5th Floor
Toronto, Ontario
M7A 2H6
Respondent (326-8453)

ONTARIO COURT OF JUSTICE

(GENERAL DIVISION)

DIVISIONAL COURT

HARTT, THEN and ADAMS JJ.

IN THE MATTER OF the Real Estate and Business
Brokers Act, R.S.O. 1990, c.R.4

AND IN THE MATTER OF the Ministry of Consumer
and Commercial Relations Act, R.S.O. 1990,
c.M.21

AND IN THE MATTER OF an appeal from the
Decision and Order of the Commercial
Registration Appeal Tribunal released
March 11, 1993

B E T W E E N:

THE REGISTRAR OF REAL ESTATE AND
BUSINESS BROKERS

Appellant

- and -

ALBERT FACCENDA

Respondent

)
)
) Alvin Torbin for the
) Ministry of Consumer and
) Commercial Relations
)
) Linda McCaffrey, Q.C. for the
) Ministry of the Attorney
) General of Ontario
)
) G. Berlingieri for the
) Respondent
)
) Heard: April 5, 1994

E N D O R S E M E N TADAMS J. (Orally)

The matter involves the following question. Did the
Tribunal apply the proper test in determining whether the proposal
made by the Registrar should have been carried out. In Brenner v.
Registrar of Motor Vehicles, Dealers and Salesmen (1983), 19 CRAT

58, this court clearly set out the proper test, in these circumstances, as follows:

... whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought that the Registrar was in error in his belief.

The Tribunal appears to have become fixated upon the Registrar's reliance on facts from his first proposal that also contributed to his third proposal. Given the test set out in s.6(1) of the Real Estate and Business Brokers Act, R.S.O. 1990, c.R.4, all past conduct is potentially relevant, notwithstanding that it was the subject of a previous proposal. It is the totality of that past conduct, considered in the light of more current circumstances, which form the basis for the relief.

Although the Tribunal was aware of the Brenner decision, it is very difficult to determine if the test, as set out in s.6(1)(b), was properly applied. The Tribunal was of the view that "there was an error of the Registrar", but did not stipulate in what respect that error was made. It is of very little assistance

to either this court, or the Registrar for that matter, for the Tribunal in its decision to merely recite the evidence. It would be of much greater help if the Tribunal had set out the test they were applying, followed by specific findings of fact which supported their conclusion.

In the circumstances of this case, we have the concern that the Tribunal appears not to have made the requisite qualitative assessment of the respondent's conduct in light of all the evidence placed before it and the standards of "integrity" and "honesty", as well as "law", imposed by s.6(1)(b). We are also troubled that the Tribunal appears to have found that a period of time during which no violation of the law is established automatically meets the required standard of belief, presumably as a matter of law or on the basis of a principle of rehabilitation, notwithstanding the nature of established past misconduct and the possible absence of positive and material exemplary conduct. Clearly, s.6(1)(b) requires a more qualitative assessment of the entire conduct of an applicant to determine whether past conduct affords reasonable grounds for belief that he or she will not carry on business in accordance with law and with integrity and honesty.

The decision of the Tribunal is therefore quashed and the matter is remitted to the Tribunal to consider, in light of the Registrar's proposal, and as required by s.6(1)(b), the evidence previously placed before it, and with the benefit of any further

representations the parties may wish to make to it.

On consent, the matter will be determined by the two remaining members of the Tribunal panel which heard the evidence in question. In view of the earlier delays and the passage of time, we anticipate the Tribunal will proceed expeditiously. No order as to costs or disbursements.

Robert J. Lee

Edmond Henry

B. C. Lee, Jr.

RELEASED:

APR 11 1994

ONTARIO COURT OF JUSTICE

(GENERAL DIVISION)

DIVISIONAL COURT

MONTGOMERY, SAUNDERS AND THEN JJ.IN THE MATTER OF the Real Estate and Business
Brokers Act, R.S.O. 1990, c.R.4IN THE MATTER OF the Ministry of Consumer and
Commercial Relations Act, R.S.O. 1990, c.M.21AND IN THE MATTER OF an appeal from the
decision and order of the Commercial
Registration Appeal Tribunal released October
29, 1992

B E T W E E N:

THE REGISTRAR OF REAL ESTATE AND
BUSINESS BROKERS

Appellant

- and -

JOSEPH H. VOGELSBERG

Respondent

)
)
) Christina Christophe
) for the Appellant
))
) Joseph H. Vogelsberg
) in person
))
) Heard: January 25, 1994
)SAUNDERS J. (Orally)

We are all of the view that the decision of the Tribunal cannot stand for the reasons submitted to us by counsel for the appellant. The Tribunal did not make a finding as to whether or not the impugned activities were in contravention of the Act or the regulations. Furthermore, and more importantly, the Tribunal did

not make a determination as to whether or not the past conduct of the respondent afforded reasonable grounds for belief that the respondent would not carry on business in accordance with law and with integrity and honesty. With respect, we are of the view that the legislation required that both determinations be made.

We wish to draw attention, in particular, to a statement by the Tribunal to the effect that the respondent, in interfering with his trust account, did not commit an act of theft, but anticipated the commissions he would receive on the transactions he genuinely believed would close, and which in fact did close. The Tribunal noted that none of his clients were hurt by his conduct. We consider such an approach to be a serious error. Interfering with a trust account is a wrongful act and the fact that no one was hurt makes no difference. In the decision of the Supreme Court of Canada in Théroux v. The Queen (1993), 79 C.C.c. (3d) 449, Madam Justice McLachlin said at page 465:

The trial judge found that the appellant deliberately lied to his customers, by means of verbal misrepresentations, a certificate of participation in the insurance scheme, and brochures advising that the scheme protected all deposits. The lies were told in order to induce potential customers to enter into contracts for the homes the appellant was selling and to induce them to give him their money as deposits on the purchase of these homes. The trial judge also found that the appellant knew at the time he made these falsehoods that the insurance for the deposits

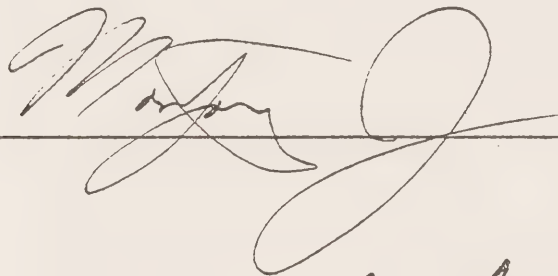
was not in place. Finally, he found that the appellant genuinely believed that the homes would be built and hence that there was no risk to the depositors. "No risk" used in this sense is the equivalent of saying the appellant believed the risk would not materialize.

Applying the principles discussed above, these findings establish that the appellant was guilty of fraud. The actus reus of the offence is clearly established. The appellant committed deliberate falsehoods. Those falsehoods caused or gave rise to deprivation. First, the depositors did not get the insurance protection they were told they would get. That, in itself, is a deprivation sufficient to establish the actus reus fraud. Secondly, the money they gave to the appellant's company was put at risk, a risk which in most cases materialized. Again, this suffices to establish deprivation.

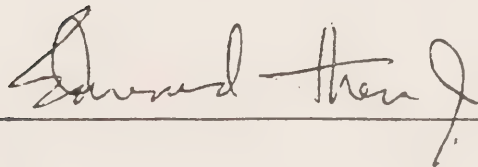
The mens rea too is established. The appellant told the depositors they had insurance protection when he knew that they did not have that protection. He knew this to be false. He knew that by this act he was depriving the depositors of something they thought they had, insurance protection. It may also be inferred from his possession of this knowledge that the appellant knew that he was placing the depositors' money at risk. That established, his mens rea is proved. The fact that he sincerely believed that in the end the houses would be built and that the risk would not materialize cannot save him.

The issue then becomes whether this court should make an order that the Registrar carry out the proposal or send the matter back to the Tribunal for further consideration. After anxious consideration, we consider, in all of the circumstances, that the appropriate course is to send the matter back, as was done in Richard G. Brenner v. Registrar of Motor Vehicle Dealers and

Salesmen (1983), 19 CRAT 58. We would draw attention to the remarks of the court in that case at p.61 and reiterate that the proper question on the rehearing remains whether the respondent has carried on activities in contravention of the Act and regulations, and whether his past conduct affords reasonable grounds for the belief that he will not carry on business in accordance with law, integrity and honesty. As the court said in Brenner, unless the Tribunal can find that his conduct does not afford such reasonable grounds, the Tribunal should not order the Registrar to refrain from carrying out his proposal.







RELEASED:

FEB 7 - 1994



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